Supreme Court, U.S.
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No. 97-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DAVID T. SABLAN,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the reasonableness of a sentence outside the applicable sentencing guideline range must be assessed by reference to analogous sentencing guidelines.

PARTIES TO THE PROCEEDINGS

All of the parties below are listed in the caption. Petitioner has no related corporate entities.

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MISCELLANEOUS AUTHORITY

United States Sentencing Commission, 1996 Annual Report 6, 18

PETITION FOR A WRIT OF CERTIORARI

David T. Sablan petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The *en banc* opinion of the court of appeals (Pet. App. 1a) is reported at 114 F.3d 913. The panel opinion of the court of appeals (Pet. App. 21a) is reported at 90 F.3d 362. The district court judgment (Pet. App. 29a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1997. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS

Pertinent provisions of 18 U.S.C. § 3742 are reproduced in the appendix (Pet. App. 37a).

STATEMENT OF THE CASE

The Sentencing Reform Act of 1984 prohibits any criminal sentence that is outside the applicable sentencing guideline range and also "unreasonable." 18 U.S.C. § 3742(e)(3) and (f)(2). This case presents fundamental questions about what legal standards, if any, govern the reasonableness of sentences outside the guidelines. At issue is whether courts must gauge the extent of their offense-related departures, and the reasonableness of the resulting sentences, by reference to analogous sentencing guidelines.[1]

By a six-to-five vote, an *en banc* panel of the Ninth Circuit held that a sentence outside the guideline applicable range must be affirmed if — *without* reference even to concededly

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[1] This case does not involve offender-related departures based on the inadequacy of a defendant's criminal history category. As to that kind of departure, the guidelines themselves explicitly require the use of analogies to, or extrapolations from, the pertinent criminal history guidelines. *See* U.S.S.G. § 4A1.3.

"analogous" guidelines — the sentence "cannot be said to be unreasonable." Pet. App. 12a. Over the objection of both parties, the Ninth Circuit overruled its own prior decision in *United States v. Lira-Barraza*, 941 F.2d 745 (9th Cir. 1991) (en banc), which had previously "*require[d]* a comparison to analogous Guideline provisions." Pet. App. 12a (emphasis in original). In so doing, the Ninth Circuit expressly repudiated a settled line of Seventh Circuit decisions including *United States v. Horton*, 98 F.3d 313 (7th Cir. 1996), and *United States v. Ferra*, 900 F.2d 1057 (7th Cir. 1990). The Ninth Circuit decision also conflicts with settled decisions of at least three other courts of appeals, and it threatens to frustrate the guidelines' principal objective of reducing unwarranted disparity in federal sentencing.

1. In 1993, petitioner threw a hand grenade into a parking lot near a Guam police station and a United States post office. The grenade bounced off a car, rolled towards the post office, and exploded. The blast severely injured three bystanders and damaged the exterior of the post office. Pet. App. 2a.[2] In Guam Superior Court, petitioner pleaded guilty to territorial offenses and received a ten-year sentence. Pet. App. 3a.

Petitioner sought federal prosecution in order to serve his time in a federal prison, at which he could receive otherwise unavailable psychiatric treatment. Petitioner thus pleaded guilty to maliciously damaging federal government property with an explosive, in violation of 18 U.S.C. § 844(f).[3] Under the terms

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[2] A physician who evaluated petitioner concluded that the offense "was likely calculated to damage a police car, not to injure bystanders." Pet. App. 23a.

[3] At the time of petitioner's offense, section 844(f) provided:

> Whoever maliciously damages . . . by means of an explosive, any . . . personal or real property in whole or in part owned, possessed, or used by . . . the United States . . . shall be imprisoned for not more than ten years, or fined not more that $10,000, or both; and if personal injury results . . . shall be imprisoned for not more

of the federal plea agreement, the government agreed to recommend that petitioner receive a ten-year sentence, to be imposed concurrently with his Guam sentence. Pet. App. 3a.

Under the applicable offense guidelines, petitioner received a base offense level of 24 (U.S.S.G. § 2K1.4) and a three-level downward adjustment for acceptance of responsibility (*id.* § 3E1.1), for an adjusted offense level of 21. Pet. App. 33a. Petitioner's criminal history category was I (*id.*), and his sentencing range was therefore 37 to 46 months (U.S.S.G. ch. 5, pt. A). To support the contemplated ten-year sentence, the parties agreed that the government would move for an upward departure, based on the extent of the victims' physical injuries, to no more than level 32. Pet. App. 3a.[4]

2. On its own motion, however, the district court[5] departed upwards to level 37 and imposed on petitioner the maximum 20-year sentence authorized by statute. Pet. App. 3a.[6] In its formal statement of reasons, the court stated only that it had "departed upward to offense level 37 based on the significant physical injury suffered by the victims." Pet. App. 30a. At the sentencing hearing, the court stated that it had departed "mainly because of

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than twenty years, or fined not more than $20,000, or both . . . .

[4] It is undisputed that these injuries are a permissible basis for departure. The offense guideline applicable to petitioner states that "[i]f bodily injury resulted, an upward departure may be warranted." U.S.S.G. § 2K1.4 application note 1. Similarly, the offense-related departure provisions state that "[i]f significant physical injury resulted, the court may increase the sentence above the authorized guideline range." *Id.* § 5K2.2.

[5] The district court had jurisdiction under 18 U.S.C. § 3231.

[6] Both parties opposed the extent of the departure. Pet. App. 33a-34a. The government noted that it had become involved in the case only to move petitioner into a federal prison, that the departure would be inconsistent with the plea agreement, and that petitioner had cooperated with the federal authorities. Pet. App. 34a.

the physical injury involved" and "secondarily, because of the property damage, and also because it is hoped that there will be some deterrence." Pet. App. 36a. The court never attempted either to quantify the appropriate incremental punishment for any of these considerations or to justify the extent of that punishment by reference to analogous guideline provisions, as required under then-binding circuit precedent (*see Lira-Barraza*, 941 F.2d at 747-51). Petitioner appealed the extent of the departure.

3. A panel of the Ninth Circuit unanimously vacated petitioner's sentence. Applying *Lira-Barraza*, the panel held that "the extent of an upward departure must still be governed by analogy to other Guidelines categories." Pet. App. 25a. The panel concluded that the district court did not, and could not, "establish the degree of the departure by analogy to other Guidelines provisions." *Id.* The panel concluded that the extent of the victims' injuries could not support a 16-level upward departure, because several analogous guidelines impose only a six-level upward adjustment to account for a victim's "'permanent or life-threatening' bodily injury." Pet. App. 26a.[7] The panel further held that the district court did not, and could not, justify

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[7] The offense guidelines for aggravated assault (U.S.S.G. § 2A2.2), robbery (*id.* § 2B3.1), extortion by force or threat (*id.* § 2B3.2), and making an extortionate extension of credit (*id.* § 2E2.1) all provide for only a six-level adjustment if a victim sustains "permanent or life-threatening bodily injury." The panel viewed the robbery and extortion by force guidelines as particularly significant because those crimes, like petitioner's, are "property-directed offenses that recklessly endanger others." Pet. App. 26a. As the panel recognized (*id.*), an additional upward adjustment would be appropriate to account for the fact of multiple victims. But even if petitioner's offense were analogized to three entirely distinct crimes, on the ground that there were three different victims, that consideration would support a further upward departure of at most three additional levels. *See* U.S.S.G. § 3D1.4. Under *Lira-Barraza*, therefore, the extent of the victims' physical injuries could support an upward departure of at most nine levels, which in turn could support a sentence of at most 121 months (*see id.* ch. 5, pt. A).

the extent of the departure in terms of its secondary concerns about either property damage (Pet. App. 24a n.1) or deterrence (Pet. App. 26a-27a).

4. On its own motion, the court of appeals directed the parties to file briefs addressing whether this case should be reheard *en banc*. The court instructed the parties to address whether *Lira-Barraza*'s analogy requirement is consistent with this Court's decision in *Koon v. United States*, 116 S. Ct. 2035 (1996). Both parties opposed rehearing on the ground that *Lira-Barraza* and *Koon* are consistent.[8] Nonetheless, the court of appeals granted rehearing and then, without either merits briefing or oral argument, held that *Lira-Barraza* should be overruled.[9]

A six-judge majority concluded that, "[i]n light of *Koon*," which addressed "the appropriate standards of appellate review of a district court's decision to depart" (116 S. Ct. at 2040), *Lira-Barraza*'s analogy requirement was unduly "mechanistic." Pet. App. 12a.[10] The court acknowledged that its holding directly

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[8] *See* Appellant Sablan's Brief Re: Rehearing En Banc at 1-2, *United States v. Sablan*, No. 94-10534 (9th Cir. Sept. 23, 1996); Brief for the United States Opposing En Banc Review ("U.S. Brief") at 5-7, *United States v. Sablan*, No. 94-10534 (9th Cir. Sept. 25, 1996).

[9] The case was decided on the briefs submitted to the panel, which were filed prior to this Court's decision in *Koon* and which assumed that *Lira-Barraza* was a binding precedent. *See* Brief for Appellant, *United States v. Sablan*, No. 94-10534 (9th Cir. June 26, 1995); Brief for Appellee, *United States v. Sablan*, No. 94-10534 (9th Cir. Aug. 3, 1995).

[10] It is undisputed that *Koon* overruled *Lira-Barraza*'s application of a plenary standard of review (*see* 941 F.2d at 746) to the question whether the Sentencing Commission had adequately taken a given circumstance into consideration. *See Koon*, 116 S. Ct. at 2047 (applying deferential abuse-of-discretion standard); Pet. App. 5a-6a (majority); Pet. App. 13a-14a & n.1 (dissent). The only disputed question is whether *Koon* also undercuts *Lira-Barraza*'s separate holding (*see* 941 F.2d at 747-51) that, as a substantive matter, "the extent of an upward departure *requires* a comparison to analogous Guidelines provisions" (Pet. App. 12a).

conflicted with the Seventh Circuit's pre-*Koon* decision in *Ferra*, which imposed an analogy requirement identical to *Lira-Barraza*'s (*see* 900 F.2d at 1061-64), and with the Seventh Circuit's post-*Koon* decision in *Horton*, which held that *Ferra* remains good law after *Koon* (*see* 98 F.3d at 319). Pet. App. 12a & n.9. Without attempting to quantify the various considerations cited by the district court, and without reference to the "analogous" guidelines imposing a six-level enhancement for permanent or life-threatening injuries, the *en banc* majority concluded that the extent of the departure was not "unreasonable." Pet. App. 12a. On that ground, the court affirmed petitioner's 20-year sentence. *Id.*

Five judges dissented. The dissenters argued that, for several reasons, *Koon* did not undercut the analogy requirement established in decisions like *Ferra* and *Lira-Barraza*. Pet. App. 13a-14a & n.2. The dissenters concluded that the 16-level upward departure could not be justified by reference to analogous guideline provisions, and they accordingly would have vacated petitioner's sentence and remanded the case for resentencing. Pet. App. 15a-17a.

REASONS FOR GRANTING THE WRIT

In over 13,000 cases annually, the district courts impose criminal sentences outside the applicable sentencing guideline range. *See* United States Sentencing Commission, 1996 Annual Report, at 33-34. This case raises fundamental questions about how those sentences should be determined.

Many courts of appeals have held that, even where an offense-related departure is permissible, courts must "link the extent of departure to the structure of the guidelines." *Ferra*, 900 F.2d at 1062. That process involves quantifying the various circumstances supporting the departure by analogy to base offense levels or specific offense characteristics found in other guidelines; combining those impacts through guideline-specified principles of grouping (for discrete offenses) or simple addition (for specific offense characteristics); and sentencing within the guideline range applicable to the adjusted offense level as so constructed.

In this case, however, the Ninth Circuit adopted a radically different approach. It held that the guidelines need not be consulted at all in determining an appropriate departure sentence. The Ninth Circuit decision will produce a substantial degree of unwarranted sentencing disparity both across the courts of appeals, which are now governed by dramatically different departure standards, and within the Ninth Circuit itself, where the decision below has eliminated the most significant objective standards for assessing the reasonableness of departure sentences. Review is essential to eliminate those disparities and to address the important and recurring question presented.

I. THE CIRCUITS ARE DIVIDED ON WHETHER COURTS MUST GAUGE THE EXTENT OF DEPARTURES BY REFERENCE TO ANALOGOUS GUIDELINES

The Ninth Circuit decision exacerbates a longstanding division of authority on the question whether courts must gauge the extent of departures by reference to analogous guideline provisions. The Ninth Circuit decision conflicts with well-settled precedents not only from the Seventh Circuit, but also from the Second, Third, and Tenth Circuits. On the other hand, the Ninth Circuit decision is consistent with well-settled First Circuit precedent.[11]

Speaking through Judge Easterbrook, the Seventh Circuit in *Ferra* held that sentencing courts, in order to avoid imposing "unreasonable" sentences within the meaning of 18 U.S.C. § 3742(e)(3), must "link the extent of departure to the structure of the guidelines." *See* 900 F.2d at 1061-62 ("A judge may not say: 'I have decided to depart, so I now throw away the guidelines.'"). "Unless there is discipline in determining the amount of departure," the court of appeals explained, "sentencing disparity will reappear" in cases involving departures. *See id.* at

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[11] Even before the Ninth Circuit reversed its position, courts had noted the existence of a conflict between the Second, Third, Seventh and Tenth Circuits on the one hand, and the First Circuit on the other. *See, e.g., United States v. Lara*, 975 F.2d 1120, 1126 (5th Cir. 1992); *United States v. Jones*, 948 F.2d 732, 740 (D.C. Cir. 1991).

1062. The court held that, in gauging the extent of a departure based on aggravating circumstances not addressed in the applicable guideline, a sentencing court "should compare the seriousness of the aggravating factors at hand with those the Commission considered" in other guidelines. *See id.*

The Seventh Circuit repeatedly has applied and reaffirmed these principles. For example, in *United States v. Sherman*, 53 F.3d 782 (7th Cir. 1995), the Seventh Circuit vacated a downward departure because the district court had failed "'to adjust the defendant's sentence by utilizing an incremental process that quantifies the impact of the factors considered by the court on the defendant's sentence.'" *See id.* at 789 (citation omitted). The court reiterated that the extent of any departure must be justified "with reference to the Guidelines" and "within the framework of the existing Guidelines." *See id.* The Seventh Circuit vacated a similarly deficient departure in *Horton* (*see* 98 F.3d at 318-19), where it confirmed that "a district court determines the extent of an upward departure by comparing the seriousness of the aggravating factors that motivate the departure with the adjustments in base offense level prescribed by the guideline provisions that apply to conduct most closely analogous to the defendant's offense conduct." *Id.* at 317. *Accord, e.g.*, *United States v. Hogan*, 54 F.3d 336, 341-42 (7th Cir. 1995) (vacating upward departure) ("The command to 'link the extent' of the departure to the structure of the Guidelines envisions the use of analogy to factors existing in the Guidelines."); *United States v. Boula*, 932 F.2d 651, 655 (7th Cir. 1991) (vacating upward departure) ("degree of departure" must reflect the "structure of the Guidelines"); *United States v. Gentry*, 925 F.2d 186, 189 (7th Cir. 1991) (vacating downward departure) ("The project of the guidelines is to produce similar sentences for similar conduct across the nation, a project that cannot succeed if the justification

for slight departure allows the judge to cast the guidelines aside.").[12]

The Second Circuit also requires the extent of offense-related departures to be assessed by reference to analogous guideline provisions. In *United States v. Kim*, 896 F.2d 678 (2d Cir. 1990) (Newman, J.), that court held that a sentencing court must "compare the defendant's conduct, with its aggravating circumstances, to the type of conduct for which the Commission has prescribed more severe punishment." *Id.* at 685. The court reasoned that "the structure of the Guidelines offers some guidance as to the normal *extent* of the departure." *Id.* at 684 (emphasis in original). In *United States v. Joyner*, 924 F.2d 454 (2d Cir. 1991), the Second Circuit held that "requiring consideration of analogous offense levels" is "appropriate" in the context of both upward and downward departures. *See id.* at 461-62. And in *United States v. Rodriguez*, 968 F.2d 130 (2d Cir.), *cert. denied*, 506 U.S. 847 (1992), the Second Circuit reaffirmed *Kim*'s "fundamental premise" that courts should "loo[k] to

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[12] The Seventh Circuit has affirmed the extent of departures only where these requirements have been satisfied. *See, e.g., United States v. Billingsley*, 115 F.3d 458, 467 (7th Cir. 1997) (district court "expressly looked to another guideline provision to determine the appropriate extent of departure"); *United States v. Akindele*, 84 F.3d 948, 955 (7th Cir. 1996) (district court "properly quantified the impact" of aggravating circumstance "by comparing it to other aggravating factors which the Commission has considered"); *United States v. Sarna*, 28 F.3d 657, 663 (7th Cir. 1994) (extent of departure "'must be linked to the structure of the guidelines'") (citation omitted)); *United States v. Newman*, 965 F.2d 206, 213 (7th Cir.) (Posner, J.) (extent of departure must be "based on policies found in the guidelines themselves rather than in the personal penal philosophy of the sentencing judge"), *cert. denied*, 506 U.S. 976 (1992).

analogous Guidelines provisions to determine the extent of the departure." *See id.* at 140.[13]

The Third Circuit adopted the analogy requirement in *United States v. Kikumura*, 918 F.2d 1084 (3d Cir. 1990). Speaking through Judge Becker, that court stressed that sentencing courts must "look to the guidelines themselves in determining the reasonableness of a departure." *See id.* at 1111. The court held that where the aggravating circumstance at issue constitutes a specific offense characteristic in other guidelines, the "gravity attached to the characteristic in the other guidelines provides appropriate guidance as to what degree of departure would be reasonable." *See id.* at 1113.

Applying these principles, the Third Circuit in *Kikumura* approved a 14-level upward departure based on a series of analogies to the guidelines for attempted murder, for grouping of multiple counts, for more than minimal planning, and for extreme conduct. *See id.* at 1115-19. Each aggravating circumstance supported a discrete guidelines analogy and, correspondingly, a discrete ennancement to the appropriate offense level and to the defendant's incremental punishment. *See id.* at 1119. The court held that any departure to a point above the enhanced offense level would be unreasonable. *See id.*

The Third Circuit repeatedly has applied *Kikumura* to restrict the permissible extent of departure. For example, in *United States v. Bierley*, 922 F.2d 1061 (3d Cir. 1990), the court confirmed that even where a departure is warranted, "the district

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[13] *Accord, e.g., United States v. Malpeso*, 115 F.3d 155, 170 (2d Cir. 1997) (affirming four-level upward departure "drawn in direct parallel" to analogous guideline provision); *United States v. Stephens*, 7 F.3d 285, 290 (2d Cir. 1993) (extent of upward departure is proper if defendant's conduct is "the same or similar to that referred to" in analogous guideline); *United States v. Alter*, 985 F.2d 105, 107-08 (2d Cir. 1993) (per curiam) (vacating sentence under *Kim* where extent of departure exceeded top of sentencing range established by analogy), *cert. denied*, 511 U.S. 1057 (1994).

court should ordinarily do so only to the extent of the most nearly analogous Guideline." *Id.* at 1069. *See also id.* at 1071 (Alito, J., dissenting) ("a sentencing court that departs from the Guidelines generally must be guided by any analogous Guidelines provisions"). The court held that any downward departure based on a defendant's role in an offense may not exceed the four-level adjustment specified in the analogous mitigating role guideline. *See* 922 F.2d at 1069. In *United States v. MacLeod*, 80 F.3d 860 (3d Cir. 1996), the Third Circuit once again applied *Kikumura*'s bedrock principle: "When departing from a sentencing range, courts should remain faithful to structured guideline principles and attempt, where possible, to create sentences analogous to those explicitly specified by the guidelines for similar offenses." *Id.* at 868. The court vacated a sentence where the extent of the upward departure was inconsistent with the guidelines' structural principles of diminishing marginal punishment. *See id.* at 868. *See also United States v. Stuart*, 22 F.3d 76, 83 (3d Cir. 1994) ("'When departing on the basis of offense characteristics, the sentencing court should extend or extrapolate from other Guideline levels or principles, or employ analogies to closely related circumstances or conduct addressed by the Guidelines.'" (citation omitted)).[14]

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[14] Like the Seventh Circuit, the Third Circuit has affirmed sentences outside the applicable guideline range only where the extent of the departure is supported by reference to the guidelines. *See, e.g., United States v. Baird*, 109 F.3d 856, 871-72 (3d Cir. 1997) (affirming four-level upward departure based on "reasonable analogy" to guideline enhancement for planned harm to the government), *cert. pending* (No. 97-5524); *United States v. Lieberman*, 971 F.2d 989, 999 (3d Cir. 1992) ("the district court followed our precedent in fixing the amount of departure by reference to an applicable counterpart in the Guidelines"); *United States v. Johnson*, 931 F.2d 238, 241 (3d Cir.) (in departing upwards to account for three victims, district court "applied the Guidelines as if Johnson had been convicted of three counts"), *cert. denied*, 502 U.S. 886 (1991).

The Tenth Circuit adopted the analogy requirement in its *en banc* decision in *United States v. Jackson*, 921 F.2d 985 (10th Cir. 1990) (en banc). Citing *Ferra*, the court held that a sentencing court "should look to the Guidelines for guidance in characterizing the seriousness of the aggravating circumstances to determine the proper degree of departure." *Id.* at 990. The court held that, where the aggravating circumstance at issue constitutes a specific offense characteristic under another guideline, a sentencing court should "[s]imply ad[d] to the defendant's offense level the points assigned" in that guideline. *See id.* at 991.

Following *Jackson*, the Tenth Circuit repeatedly has vacated sentences where the extent of departure was not justified with reference to the guidelines. *See, e.g., United States v. Arutunoff*, 1 F.3d 1112, 1120 (10th Cir.) (vacating downward departure) (sentencing court "should justify the departure by analogy to or extrapolation from the Guidelines"), *cert. denied*, 510 U.S. 1017 (1993); *United States v. Flinn*, 987 F.2d 1497, 1505 (10th Cir. 1993) (vacating upward departure where district court failed to use "analogy or extrapolation"); *United States v. Roth*, 934 F.2d 248, 252 (10th Cir. 1991) (vacating upward departure) ("Nowhere did the sentencing court draw analogies to the guidelines or explain its sentence in guideline terms"), *cert. denied*, 506 U.S. 1026 (1992); *United States v. St. Julian*, 922 F.2d 563, 569 (10th Cir. 1990) (vacating upward departure) ("Once the decision to depart has been made, the guidelines must again be consulted, using the facts and circumstances that justify departure to arrive at the most appropriate offense level").[15]

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[15] The Tenth Circuit has affirmed sentences outside the guideline range only where the extent of departure has been justified by reference to the guidelines. *See, e.g., United States v. Collins*, 1997 U.S. App. LEXIS 20671, *37 (10th Cir. Aug. 5, 1997) (affirming downward departure where district court "applied a sentence within the range that would have applied" by analogy); *United States v. St. Julian*, 966 F.2d 564, 568 (10th Cir.) (affirming upward departure where district court "treated the aggravating factor . . . as a separate crime" and calculated a new offense level accordingly), *cert. denied*, 506 U.S. 925 (1992); *United*

The First Circuit, on the other hand, has squarely held that courts need not assess the extent of a departure by reference to analogous guideline provisions. In *United States v. Diaz-Villafane*, 874 F.2d 43 (1st Cir.), *cert. denied*, 493 U.S. 862 (1989), the court rejected what it characterized as a "surreal" contention "that departures are merely a matter of arithmetic." *See id.* at 51-52. The court held that a sentencing judge is *not* "bound to search for the presence of each discerned circumstance elsewhere in the Guidelines, attribute a sentencing range to it, and then add the various sentences together." *Id.* at 52. The court affirmed a substantial upward departure, based on a totality-of-the-circumstances assessment of reasonableness, without any attempt to quantify the incremental effect of the five aggravating circumstances relied on by the district court, much less to do so, for each circumstance, by reference to the guidelines themselves. *See id.*

The First Circuit has repeated these principles many times. In *United States v. Ocasio*, 914 F.2d 330 (1st Cir. 1990), the court explicitly rejected *Kim*'s assertedly "formulaic" approach to assessing the reasonableness of departures. *See id.* at 336. In *United States v. Aymelek*, 926 F.2d 64 (1st Cir. 1991), the court reiterated its view that "a sentencing court need not resort at all to analogies" when making offense-related departures, and that such departures are "bounded in extent only by statutorily prescribed maxima and the general parameters of reasonableness." *See id.* at 70. In *United States v. Rostoff*, 53 F.3d 398 (1st Cir. 1995), the court held that a sentencing court has "'no obligation'" to "'to quantify the impact of each incremental factor on the departure sentence.'" *Id.* at 408 (citation omitted). *See also id.* (court need not "'dissect its departure decision, explaining in mathematical or pseudo-mathematical terms each microscopic

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States v. Strickland, 941 F.2d 1047, 1051 (10th Cir.) (affirming two-level upward departure supported by analogy to enhancement provision for more than minimal planning), *cert. denied*, 502 U.S. 993 (1991).

choice made at arriving at the precise sentence'" (citation omitted)).[16]

II. *KOON* DOES NOT ELIMINATE THE WORSENING CIRCUIT CONFLICT

In *Koon*, this Court held that departure decisions are subject to a deferential abuse-of-discretion standard of appellate review. *See* 116 S. Ct. at 2046-48. The court of appeals suggested that this holding somehow compelled it to overrule *Lira-Barraza's* analogy requirement. Pet. App. 12a (overruling "[i]n light of" *Koon*). Nonetheless, *Koon* simply does not address the persistent circuit conflict.

By its terms, *Koon* addressed only the "appropriate standards of appellate review of a district court's decision to depart." 116 S. Ct. at 2040. Standards of review involve the allocation of decisionmaking authority between the district courts and the courts of appeals. *See, e.g., id.* at 2047; *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 403-05 (1990); *Pierce v. Underwood*, 487 U.S. 552, 559-62 (1988). As the court of appeals itself recognized, "[t]o say that departure decisions must be reviewed for an abuse of discretion . . . says nothing about what factors a district court should take into consideration when confronted with the question of whether or not to depart in a particular case." Pet. App. 7a. Similarly, to say that the extent of a departure must be reviewed deferentially on appeal says little about whether the district court, in determining the extent of the

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[16] *Accord, e.g., United States v. Hardy*, 99 F.3d 1242, 1253 (1st Cir. 1996) (affirming extent of departure based on "'"the overall aggregate of known circumstances"'" (citations omitted))); *United States v. Figaro*, 935 F.2d 4, 9 (1st Cir. 1991) (affirming extent of departure based on "the totality of the circumstances"); *United States v. Harotunian*, 920 F.2d 1040, 1041 n.3 (1st Cir. 1990) (courts are "not required" to "conceptualiz[e] the degrees of upward and downward departure in terms of offense levels within the guidelines and dra[w] analogies therefrom").

departure in the first instance, should consult the objective standards set forth in analogous guidelines.[17]

The analogy requirement preserves for the district courts a broad range of discretion to select an appropriate criminal sentence. As the Tenth Circuit has explained, the requirement merely provides a "framework" within which the district courts "may exercise their discretion." *Jackson*, 921 F.2d at 991; *see also Lira-Barraza*, 941 F.2d at 750 ("The question is not the existence of discretion . . . but the standards that must govern the district court in its exercise.").[18] District courts retain discretion in selecting the most appropriate offense level where no obvious analogy is available, *see, e.g., United States v. Baird*, 109 F.3d 856, 872 n.17 (3d Cir. 1997), *cert. pending* (No. 97-5524); *Joyner*, 924 F.2d at 462, or where competing plausible analogies are available, *see, e.g., United States v. Billingsley*, 115 F.3d 458, 467 (7th Cir. 1997). Moreover, the sentencing range derived by analogy merely defines the outer limit of the district court's departure options. The district court retains discretion to sentence anywhere within that range, anywhere within the actual guideline range, or anywhere in between. The permissible choices are often considerable; in *Kikumura*, for example, application of the analogy requirement merely narrowed the effective sentencing range to between 27 and 262 months. *See* 918 F.2d at 1110-19. This framework is hardly inconsistent with

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[17] Moreover, as the dissenters below noted (Pet. App. 14a), *Koon* addressed only "the decision to depart," and "not the extent of any departure." Pet. App. 14a.

[18] As the government explained below, "the requirement that a district court determine the extent of a departure by analogizing to other Guidelines provisions does not alter the essentially discretionary nature of that determination," but instead "simply guides the district court in the exercise of its discretion." U.S. Brief, *supra* note 8, at 7.

the premise that the district courts retain a considerable degree of sentencing discretion. *See Koon*, 116 S. Ct. at 2046-47.[19]

Not surprisingly, the Second, Third, Seventh and Tenth Circuits have continued to apply the analogy requirement after *Koon*. Indeed, the Seventh Circuit has explicitly rejected the contention that *Koon* supersedes *Ferra* and its progeny. *See Horton*, 98 F.3d at 319 ("Because [the analogy] requirement does not deprive the district judge of the deference to which he is due, we do not believe it to be inconsistent with *Koon*."); *see also Billingsley*, 115 F.3d at 466-67 (applying *Ferra*). Similarly, in its most recent decision applying *Jackson*, the Tenth Circuit explicitly acknowledged the Ninth Circuit's holding in this case, indicating its disapproval of it with a "but see" citation. *See United States v. Collins*, 1997 U.S. App. LEXIS 20671, *37 (10th Cir. Aug. 5, 1997). The Second and Third Circuits also have continued to apply the analogy requirement. *See United States v. Malpeso*, 115 F.3d 155, 169-70 (2d Cir. 1997) (citing *Koon* and *Kikumura*); *Baird*, 109 F.3d at 871 (same).

In sum, there is no basis for supposing that *Koon* will ameliorate the longstanding disagreement about the analogy requirement. *Koon* does not address that requirement, which most courts have continued to apply. And although the Ninth Circuit reversed its position in light of *Koon*, the sole impact of that change has been to replace a five-to-one circuit split with a

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[19] If anything, *Koon* tends to support, not undercut, the analogy requirement. In *Koon*, this Court explained that departures must consider the "'structure and theory of both relevant individual guidelines and the Guidelines taken as a whole.'" 116 S. Ct. at 2045 (citation omitted). Moreover, the departure in *Koon* itself followed *Lira-Barraza*, a then-binding circuit precedent, with specific mitigating circumstances tied to specific offense-level reductions. *See United States v. Koon*, 833 F. Supp. 769, 791-92 (C.D. Cal. 1993), *aff'd in part and vacated in part*, 34 F.3d 1416 (9th Cir. 1994), *aff'd in part and rev'd in part*, 116 S. Ct. 2035 (1996). This Court indicated no disapproval in its detailed review of that departure. *See* 116 S. Ct. at 2048-54.

four-to-two circuit split. Because the Ninth Circuit has actually exacerbated the split, review by this Court is now essential.

III. THE DECISION BELOW WILL PRODUCE UNWARRANTED SENTENCING DISPARITY

The Sentencing Reform Act of 1984 "revolutionized" federal sentencing in order to eliminate the unwarranted disparity associated with indeterminate sentencing. *See Burns v. United States*, 501 U.S. 129, 132-33 (1991). To achieve that objective, the Act created an expert Sentencing Commission (28 U.S.C. § 991) and instructed it to promulgate detailed guidelines "with particular attention" to the primary goals of "providing certainty and fairness in sentencing and reducing unwarranted sentence disparities." *Id.* § 994(f). *See generally Mistretta v. United States*, 488 U.S. 361, 363-70 (1989).

The decision below will frustrate this salutary congressional objective. To begin with, there are obvious and unwarranted disparities flowing from the circuit split itself. As this case vividly illustrates, a departure methodology linked only to "general parameters of reasonableness" (*Aymelek*, 926 F.2d at 70) can produce a substantially greater range of outcomes than one linked by analogy to the guidelines themselves. In all probability, petitioner would have received little more than ten years if his sentence had been reviewed in Chicago or Philadelphia, as opposed to San Franciso or Boston. *See supra* note 7. That disparity warrants this Court's attention because it reflects not only a division among the courts of appeals, but also a complete frustration of the principal purpose underlying the relevant statutory scheme.

Moreover, the court of appeals' undisciplined approach to departures will produce significant unwarranted disparity even within the Ninth Circuit itself. As Judge Easterbrook has explained:

> The project of the guidelines is to produce similar sentences for similar conduct across the nation, a project that cannot succeed if the justification for slight departure allows the judge

> to cast the guidelines aside. More than 15% of all cases end in departures, according to the Sentencing Commission's annual report, and excluding such a large group from the effort to produce consistent sentences would put a big dent in the structure.

Gentry, 925 F.2d at 189. A naked prohibition against "unreasonable" departures (18 U.S.C. § 3742(e)(3)), combined with statutory ranges often as broad as twenty years (*e.g.*, *id* § 844(f)), simply cannot produce reasonably consistent outcomes across the large category of cases where departures are permissible.

Finally, it is worth noting that the decision below applies equally to downward and upward departures. As the First Circuit has explained, "[t]his street runs both ways." *Rostoff*, 53 F.3d at 411. The government frequently invokes the analogy requirement to impose rationality and consistency in the context of downward departures. *See*, *e.g.*, *United States v. Rios-Favela*, 118 F.3d 653, 660 n.5 (9th Cir. 1997); *Joyner*, 924 F.2d at 454. And because downward departures outnumber upward departures by a ratio of over ten-to-one, *see* Sentencing Commission, 1996 Annual Report, at 35, the court of appeals' opinion may well *reduce*, on average, the sentences meted out to convicted criminals. Ultimately, however, the question presented here is not whether departure sentences should on balance be lower or higher, but whether those sentences should be determined by reference to objective criteria set forth in the guidelines themselves, or to the subjective and largely unconstrained reasonableness determinations of individual sentencing judges. As explained above, that question plainly warrants this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: September 3, 1997

APPENDIX

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID TENORIO SABLAN,
Defendant-Appellant.

No. 94-10534

Submitted Jan. 23, 1997*

Decided June 5, 1997

Before: HUG, Chief Judge, BROWNING, SCHROEDER, REINHARDT, WIGGINS, BRUNETTI, KOZINSKI, LEAVY, FERNANDEZ, KLEINFELD and TASHIMA, Circuit Judges.

LEAVY, Circuit Judge:

This appeal arises out of a district court's exercise of its discretion to depart upward from the applicable Guideline range in imposing sentence. The court found aggravating circumstances for its upward departure, as required by 18 U.S.C. § 3553(b) and (c).[1]

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* The members of the en banc panel unanimously find this case to be appropriate for decision on the briefs and without oral argument pursuant to Fed.R.App.P. 34(a) and 9th Cir. R. 34-4.

[1] (b) Application of guidelines in imposing a sentence.—The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating . . . circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described . . . .

18 U.S.C. § 3553(b) (in relevant part).

(c) Statement of reasons for imposing a sentence.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

Pursuant to 18 U.S.C. § 3742(e),[2] we must now determine whether the extent of that departure was unreasonable. We have jurisdiction under 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291, and we affirm.

FACTS AND PRIOR PROCEEDINGS

On November 12, 1993, David Tenorio Sablan, a twenty-nine year old native and resident of Guam, was given a live hand grenade by his friend, Jon Russell "Chas" Simpson, and told to throw it inside the headquarters of the local police department in order to create a diversion for Simpson's robbery of a nearby store. Sablan did not quite follow Simpson's instructions; instead, he threw the grenade into the police parking lot adjacent to the local Post Office. The grenade bounced off of a car and rolled towards the Post Office where several individuals, including a woman who was nine months pregnant, were standing. Five people were injured in the blast, three of them severely. In addition, several automobiles and the exterior wall of the Post Office were damaged by flying shrapnel.

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* * *

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described.

18 U.S.C. § 3553(c)(2).

[2] (e) Consideration.—Upon review of the record, the court of appeals shall determine whether the sentence—

* * *

(3) is outside the applicable guideline range, and is unreasonable, having regard for—

(A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and

(B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

18 U.S.C. § 3742(e) (in relevant part).

Sablan pleaded guilty to territorial charges in Guam Superior Court. Pursuant to the terms of his plea agreement, Sablan was to serve ten years in prison, the sentence to run concurrently with any federal sentence which might be imposed. Federal prosecution was then sought in order for Sablan to be able to serve his sentence in a mainland federal penitentiary, where he hoped to receive psychiatric treatment that apparently was unavailable in the island facility. On June 1, 1994, Sablan waived federal indictment and, pursuant to a written agreement, entered a guilty plea to a single-count information charging him with injuring persons by maliciously damaging a Post Office with an explosive in violation of 18 U.S.C. § 844(f).[3]

The government agreed to recommend a sentence of ten years, and both parties to the plea bargain anticipated that the sentence imposed would be based on an adjusted offense level of 21 with a possible upward departure (pursuant to a subsequent motion filed by the government) to no more than level 32. The district court, however, departed upward to an offense level of 37 and imposed the (then) statutory maximum of twenty years' imprisonment,[4] to be followed by five years of supervised release. In addition, the court ordered Sablan to pay restitution

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[3] At the time of the offense, section 844(f) read, in relevant part, as follows:

> Whoever maliciously damages . . . by means of an explosive, any building . . . in whole or in part owned, possessed, or used by . . . the United States . . . shall be imprisoned for not more than ten years, or fined not more than $10,000, or both; and if personal injury results shall be imprisoned for not more than twenty years, or fined not more than $20,000, or both[.]

[4] Between the time of the offense and sentencing, Congress amended subsection (f) to increase the maximum terms of imprisonment (i.e., from ten years to twenty years for damage to government property, and from twenty years to forty years for resultant injuries to third parties), and the maximum possible fines as well. *See* Act of Sept. 13, 1994, Pub.L. No. 103-322, § 320106(1), *reprinted in* 1994 U.S.C.C.A.N. (108 Stat. 2111) at 1801.

in the amount of $19,928.72, and imposed a $50 special assessment fee. Sablan timely appealed from his sentence.

A panel of this court vacated the sentence, holding that the district court had abused its discretion by failing to gauge the extent of the departure by analogy to other Guideline provisions. *See United States v. Sablan*, 90 F.3d 362, 365-66 (9th Cir. 1996). We granted rehearing en banc. *United States v. Sablan*, 101 F.3d 618 (9th Cir. 1996).

ANALYSIS

I

It is common to say that the Sentencing Reform Act of 1984 (the "Act"), as amended, 18 U.S.C. § 3551 *et seq.*, 28 U.S.C. §§ 991-98, curtailed the broad discretion formerly afforded district judges at sentencing. What is less often noted is that the Act also provided the courts of appeals with limited jurisdiction to review federal sentences where practically no such review had existed before (i.e., with respect to those sentences which fell within the limitations set forth in the governing statutes). *See Dorszynski v. United States*, 418 U.S. 424, 431, 94 S. Ct. 3042, 3046-47, 41 L.Ed.2d 855 (1974) ("once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end").

In the several years since the adoption of the Guidelines, most, if not all, of the Circuits developed multi-step approaches to reviewing sentences that involved departures from the Guidelines. *See, e.g., United States v. Diaz-Villafane*, 874 F.2d 43, 49 (1st Cir. 1989) (3-step analysis); *United States v. Palinkas*, 938 F.2d 456, 461 (4th Cir. 1991) (4-step analysis), *judgment vacated on other grounds*, 503 U.S. 931, 112 S. Ct. 1464, 117 L.Ed. 2d 610 (1992); *United States v. Rodriguez*, 882 F.2d 1059, 1067 (6th Cir. 1989) (3-step analysis); *United States v. Gaddy*, 909 F.2d 196, 199 (7th Cir. 1990) (similar test); *United States v. Lang*, 898 F.2d 1378, 1379-80 (8th Cir. 1990) (similar test); *United States v. White*, 893 F.2d 276, 277 (10th Cir. 1990) (similar test);

United States v. Valle, 929 F.2d 629, 631 (11th Cir. 1991) (per curiam) (similar test).

Our Circuit was no exception. In *United States v. Lira-Barraza*, 941 F.2d 745 (9th Cir. 1991) (en banc), we rejected a five-step approach to reviewing departures in favor of a more streamlined three-part test, similar to that which had been announced earlier by the First Circuit in *Diaz-Villafane*. Under *Lira-Barraza*,

> we would first review de novo whether the trial court had legal authority to depart under 18 U.S.C. § 3553(b), which requires the presence of an aggravating circumstance of kind or degree not adequately considered by the Commission in formulating the Guidelines. *Id.* at 746. Next, we would review for clear error the factual findings upon which the existence of the identified circumstance was based. *Id.* Finally, we would review the extent of the departure from the applicable Guideline range for reasonableness under 18 U.S.C. § 3742(e)(3). *Id.* at 747.

United States v. Beasley, 90 F.3d 400, 402 (9th Cir.), *cert. denied*, ___ U.S. ___, 117 S. Ct. 533, 136 L.Ed.2d 418 (1996).

The Supreme Court has now changed all of this. In *Koon v. United States*, ___ U.S. ___, 116 S. Ct. 2035, 135 L.Ed.2d 392 (1996), the Court noted as a general proposition that "[a] district court's decision to depart from the Guidelines . . . will in most cases be due substantial deference, for it embodies the traditional exercise of discretion by a sentencing court." *Id.* at ___, 116 S. Ct. at 2046.

> Whether a given factor is present to a degree not adequately considered by the Commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way, are matters determined in large part by comparison with the facts of other Guidelines cases. District courts have an institutional advantage over appellate courts in making these sorts of determinations,

> especially as they see so many more Guidelines cases than appellate courts do.

Id. at ___, 116 S. Ct. at 2047. In light of these considerations, the Court declared that a unitary abuse of discretion standard was to be used when reviewing departure decisions. *Id.* at ___, 116 S. Ct. at 2047-48.

By ruling as it did, the Court effectively rejected each of the multi-step approaches to reviewing sentencing departures that had been adopted by the various Circuits and "collapsed" the steps into a single inquiry. *See United States v. Cali*, 87 F.3d 571, 579-80 (1st Cir. 1996) (acknowledging that *Koon* established a unitary abuse of discretion standard for reviewing departure decisions). *Accord United States v. Rioux*, 97 F.3d 648, 662-63 (2d Cir. 1996); *United States v. Romualdi*, 101 F.3d 971, 973 (3d Cir. 1996); *United States v. Hairston*, 96 F.3d 102, 106 (4th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 956, 136 L.Ed.2d 843 (1997); *United States v. Wells*, 101 F.3d 370, 372 (5th Cir. 1996); *United States v. Jones*, 107 F.3d 1147, 1154 n. 6 (6th Cir. 1997); *United States v. Besler*, 86 F.3d 745, 747 (7th Cir. 1996); *United States v. Field*, 110 F.3d 587, 591-92 (8th Cir. Apr.7, 1997); *United States v. Beasley*, 90 F.3d at 402-403; *United States v. Lowe*, 106 F.3d 1498, 1501 (10th Cir. 1997); *United States v. Bernal*, 90 F.3d 465, 467 (11th Cir. 1996) (per curiam); *United States v. Dyce*, 91 F.3d 1462, 1472 (D.C. Cir.) (Tatel, J., concurring in denial of rehearing and rehearing en banc), *cert. denied*, ___ U.S. ___, 117 S. Ct. 533, 136 L.Ed.2d 418 (1996). The Court noted, however, that even under this deferential abuse of discretion standard, a "district court by definition abuses its discretion when it makes an error of law." *Koon*, ___ U.S. at ___, 116 S. Ct. at 2047.

In light of *Koon's* mandate that a unitary abuse of discretion standard governs our review of departure decisions, we conclude that *Lira-Barraza* has been overruled. *See Beasley*, 90 F.3d at 403. *See also United States v. Ripinsky*, 109 F.3d 1436, 1445-46 (9th Cir. Mar. 28, 1997) (citing *Beasley*).

II

To say that departure decisions must be reviewed for an abuse of discretion, however, says nothing about what factors a district court should take into consideration when confronted with the question of whether or not to depart in a particular case. Fortunately, the Supreme Court spelled out just what those factors should be:

> [A] sentencing court considering a departure should ask the following questions:
>
> > "1) What features of this case, potentially, take it outside the Guidelines' 'heartland' and make of it a special, or unusual, case?
> >
> > "2) Has the Commission forbidden departures based on those features?
> >
> > "3) If not, has the Commission encouraged departures based on those features?
> >
> > "4) If not, has the Commission discouraged departures based on those features?" *United States v. Rivera*, 994 F.2d 942, 949 (C.A.1 1993).

We agree with this summary. If the special factor is a forbidden factor, the sentencing court cannot use it as a basis for departure. If the special factor is an encouraged factor, the court is authorized to depart if the applicable Guideline does not already take it into account. If the special factor is a discouraged factor, or an encouraged factor already taken into account by the applicable Guideline, the court should depart only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present. Cf. *ibid.* If a factor is unmentioned in the Guidelines, the court must, after considering the "structure and theory of both relevant individual guidelines and the Guidelines taken as a whole," *id.*, at 949, decide whether it is sufficient to take the case out of the Guideline's heartland. The court must bear in mind the Commission's expectation that departures based on grounds not

> mentioned in the Guidelines will be "highly infrequent." 1995 U.S.S.G. ch. 1, pt. A.

Koon, ___ U.S. at ___, 116 S. Ct. at 2045.

The district court identified factors which took Sablan's case out of the "heartland," and expressly relied on such approved grounds for departure as those listed at U.S.S.G. ch. 5, pt. K, § 2, including "significant physical injury" (§ 5K2.2)[5] and "property damage" (§ 5K2.5).[6] In light of the above, it cannot be said that the district court abused its discretion by deciding to depart from the Guideline range.

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[5] If significant physical injury resulted, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the extent of the injury, the degree to which it may prove permanent, and the extent to which the injury was intended or knowingly risked. When the victim suffers a major, permanent disability and when such injury was intentionally inflicted, a substantial departure may be appropriate. If the injury is less serious or if the defendant (though criminally negligent) did not knowingly create the risk of harm, a less substantial departure would be indicated. In general, the same considerations apply as in § 5K2.1 [i.e., when death results].

U.S.S.G. § 5K2.2, p.s.

Sablan's base offense level of 24 was calculated under U.S.S.G. § 2K1.4(a)(1)(A), because he knowingly created a substantial risk of death or serious bodily injury to third parties by damaging property with explosives. *See id.* However, because bodily injury actually resulted, an upward departure was warranted under § 5K2.2. *See* U.S.S.G. § 2K1.4, comment. (n.1).

[6] If the offense caused property damage or loss not taken into account within the guidelines, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the extent to which the harm was intended or knowingly risked and on the extent to which the harm to property is more serious than other harm caused or risked by the conduct relevant to the offense of conviction.

U.S.S.G. § 5K2.5, p.s.

III

As a final matter, we must determine whether the extent of the district court's departure was so great as to be unreasonable for purposes of 18 U.S.C. § 3742(f)(2).[7] *See Williams v. United States*, 503 U.S. 193, 202, 112 S. Ct. 1112, 1120, 117 L.Ed.2d 341 (1992) (if the reviewing court concludes that the decision to depart was not the result of an erroneous interpretation of the Guidelines, it must then determine whether "the resulting sentence [is] an unreasonably high . . . departure from the relevant guideline range"). In the absence of such a determination, we must affirm the sentence imposed. *See* 18 U.S.C. § 3742(f)(3).[8]

The district court identified three reasons for its decision to depart upward: The significant physical injuries suffered by three of the bombing victims, the extent and value of the property

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[7] (f) Decision and disposition.— If the court of appeals determines that the sentence —

* * *

(2) is outside the applicable guideline range and is unreasonable or was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and —

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate . . . .

18 U.S.C. § 3742(f)(2)(A).

[8] (f) Decision and disposition.— If the court of appeals determines that the sentence —

***

(3) is not described in paragraph (1) [i.e., imposed in violation of law or an incorrect application of the Guidelines] or (2) [outside the applicable Guideline range and unreasonable in extent, or plainly unreasonable if "imposed for an offense for which there is no applicable sentencing guideline"], it shall affirm the sentence.

18 U.S.C. § 3742(f)(3) (in relevant part).

damaged in the blast, and the need for greater deterrence than usual because the judge knew that the criminal who had asked Sablan to throw the grenade into the police station had bought at least one more, and the man who had sold it to him might well have more.

> There are several other factors besides the—criteria noted, the severe pain and hospitalization. And one of them is that there are also other grenades still out there.
>
> * * *
>
> The justification for this, the upward departure from the prescribed Sentencing Guidelines to the 20-year maximum imprisonment sentence authorized by law is justifiable considering the extent of the physical injury, and the property damage suffered by the victims. Despite the victim's—or the defendant's—excuse me—defendant's characteristics, detonating a grenade is a very serious offense; the harm placed on other people's lives and property will not be tolerated.
>
> * * *
>
> The court also settled on this point in the Sentencing Guidelines mainly because of the physical injury involved; and secondarily, because of the property damage, and also because it is hoped that there be some deterrence that will be gained, that will be derived as a result of this case.

C.R. # 14 (T.R. of 10/21/94) at 10, 22-23.

> The presentence report said:
>
> [T]he defendant met a friend of Simpsons, J.T. Taimanglo. Taimanglo gave Sablan a grenade at Simpson's home, Taimanglo showed two grenades which Simpson paid a "fiver" for each grenade.

As already noted, the first two factors have been identified by the Sentencing Commission as grounds justifying upward departures. *See* U.S.S.G. § 5K2.2, p.s. (physical injury) and U.S.S.G. § 5K2.5, p.s. (property damage). The third factor was a permissible ground for departure in this case, because of the

special circumstance alluded to by the judge. The Sentencing Commission weighed the need generally to deter damaging government property with explosives or fire, pursuant to the directive that it do so in 28 U.S.C. § 994(c)(6). But the special circumstance of more live grenades known still to be in related criminal hands in the locality was an out of the ordinary circumstance which the district judge could permissibly consider in deciding that more deterrence than usual was necessary.

Here, the court's principal concern was clearly with the significant injuries suffered by three of the bombing victims. Citing *United States v. Singleton*, 917 F.2d 411, 413-14 & n. 2 (9th Cir. 1990) as guidance for what constitutes a significant injury under U.S.S.G. § 5K2.2, the court discussed the nature and extent of the wounds inflicted by the bomb:

> And for the record, Ann C. Mendiola still has shrapnel in her body, still experiences numbness and pain in her bones in the area where the shrapnel remains; and for three weeks after the blast incident she had difficulty sleeping, and she had nightmares about the blast.
>
> Ms. Mildred Isimang was nine months pregnant; she had four shrapnel wounds to her back[;] one on her buttocks, one on her left arm, one near her left ear, two shrapnel wounds in each leg. And she stated that delivering her baby was hell because it was very difficult since she couldn't lie on her back; the labor lasted seven hours which was the longest she had experienced. And she still has shrapnel in her body and experiences numbness and pain where indicated.
>
> Mr. Toves had to have surgery, because of shrapnel injuries to the stomach area. He had the through and through perforation of the ileum, with perforation of the right transverse column, laceration of the omentum, and right perineal histoma. And because of his injuries he had to use 300 hours of sick leave to recuperate.

C.R. # 14 (T.R. of 10/21/94) at 6-7.

The district court carefully explained its reasons for departing upward from the Guideline range, and did so on the basis of factors that have been expressly designated by the Sentencing Commission as approved bases for upward departure.

In *Lira-Barraza*, we relied heavily on the Seventh Circuit's decision in *United States v. Ferra*, 900 F.2d 1057 (7th Cir. 1990), *appeal following remand*, 948 F.2d 352 (7th Cir. 1991), as support for the proposition that the extent of an upward departure *requires* a comparison to analogous Guideline provisions.[9] 941 F.2d at 748-50. In light of *Koon*, we now reject such a mechanistic approach to determining whether the extent of a district court's departure was unreasonable, and hold that where, as here, a district court sets out findings justifying the magnitude of its decision to depart and extent of departure from the Guidelines, and that explanation cannot be said to be unreasonable, the sentence imposed must be affirmed.[10]

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[9] A split panel of the Seventh Circuit recently upheld the rationale of *Ferra* in the face of *Koon*. *See United States v. Horton*, 98 F.3d 313 (7th Cir. 1996). We note in passing that the majority in *Horton* cited to *Lira-Barraza* as continuing support for the above rule (i.e., that upward departures require comparisons to analogous Guideline provisions), while ignoring such available decisions from this Circuit as *Beasley* and *United States v. Goshea*, 94 F.3d 1361, 1365 (9th Cir. 1996), both of which declared *Lira-Barraza* to have been overruled by *Koon*.

[10] Our holding should not be interpreted as prohibiting the district courts from considering the possible relevancy of analogous guidelines. *See* 18 U.S.C. § 3553(b) ("In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission."). Such a ruling on our part would effectively amount to a usurpation of the power delegated by Congress to the Sentencing Commission to impose categorical proscriptions against considering certain factors at sentencing. *See Koon*, ___U.S. at ____, ____, 116 S. Ct. at 2047, 2051. An analysis and explanation by analogy, per *Lira-Barraza*, may

CONCLUSION

As the Supreme Court has repeatedly noted, "it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence." *Koon*, ___ U.S. ___, 116 S. Ct. at 2046 (quoting *Williams*, 503 U.S. at 205, 112 S. Ct. at 1121-22 (in turn quoting *Solem v. Helm*, 463 U.S. 277, 290 n. 16, 103 S. Ct. 3001, 3009, 77 L.Ed.2d 637 (1983))). Because the extent of the district court's departure was not unreasonable, we find no abuse of discretion in the sentence imposed. Accordingly, the decision appealed from is

AFFIRMED.

TASHIMA, Circuit Judge, with whom HUG, Chief Judge, and BROWNING, SCHROEDER and REINHARDT, Circuit Judges, join, dissenting:

All 138 of the district judges in this circuit will applaud today's majority opinion because, if a ground for departure can be found, it restores to them the unfettered discretion in sentencing which, until today, they believed Congress had closely cabined when it passed the Sentencing Reform Act of 1984. I dissent because the majority misreads the Court in *Koon v. United States*, ___ U.S. ___, 116 S. Ct. 2035, 135 L.Ed.2d 392 (1996), and casts aside the mandate of the Sentencing Guidelines. This near-absolute, and virtually unreviewable, discretion in determining the extent of a departure will apply equally to downward departures, as well as to upward departures. *See United States v. Lira-Barraza*, 941 F.2d 745, 754 n. 2 (9th Cir. 1991) (en banc) (Hall, J., concurring).

Relying on *Koon*, the majority holds that *Lira-Barraza*, 941 F.2d 745, has been overruled.[1] We agree insofar as *Lira-*

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still be a useful way for the district court to determine and explain the extent of departure, but it is not essential.

[1] Although this holding is announced in Part I of the majority opinion,

Barraza's three-part standard of review is concerned. As the majority holds, *Koon* now imposes a unitary abuse of discretion standard. *Koon*, however, did not deal with the extent of departures, only the grounds. This is where the majority strays.

The Court could not have been clearer that in *Koon* it was reviewing only the grounds of departure—the decision to depart—not the extent of any departure:

- In this case we explore the appropriate standards of appellate review of a district court's *decision to depart* from the Guidelines. ___ U.S. at ___, 116 S. Ct. at 2040 (emphasis added).
- We granted certiorari to determine the standard of review governing appeals from a district court's *decision to depart* from the sentencing ranges in the Guidelines.

Id. at ___, 116 S. Ct. at 2043 (emphasis added).

Applying an abuse of discretion standard of review to review the extent of a departure for unreasonableness is not new. We have been doing so for some time. *See United States v. Takai*, 941 F.2d 738, 742 (9th Cir. 1991). Thus, since this part of our standard of review of departures is unaffected by *Koon*, it is difficult to see how the majority can read *Koon* as overruling *Lira-Barraza* as to how we review the extent of a departure for abuse of discretion: by "requiring that departure sentences . . . be determined in light of the structure, standards and policies of the Act and Guidelines. . . ."[2] 941 F.2d at 751. By wiping out

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which discusses the standard of review, with which we do not quarrel, the discussion in Part III clearly indicates that the holding applies as well to *how we review the extent* of a departure.

[2] Even on the question of whether to depart at all, *Koon* recognizes the appropriateness of analogizing to the Guidelines.

> If a factor is unmentioned in the Guidelines, the court must, after considering the "structure and theory of both relevant individual guidelines and the Guidelines taken as a whole," *id.*, at 949, decide whether it is sufficient to take the case out of the Guideline's

Lira-Barraza's requirement that the extent of a departure be analogized to other Guideline categories, we have come to the place where "[t]he reasonableness of sentences determined without reference to identified standards . . . [are no longer] susceptible to rational review." *Id.* at 749 (footnote omitted).

The majority's "review" of the extent of the departure in this case is, itself, proof that it is unguided by any rational standard. In sum, all that the majority's review of the extent of the departure amounts to is that because two of the three grounds relied on by the district court are identified in the Guidelines as proper *grounds* for departure, and, in the majority's view, the "district court carefully explained its reasons for departing upward," the departure was not unreasonable. However, the explanation relied on by the majority is no more than a narrative statement that three persons sustained significant injury. As the three-judge panel observed, "[w]e have no way of knowing how the district court measured the degree of departure." *United States v. Sablan*, 90 F.3d 362, 365 (9th Cir. 1996) (*Sablan I*). Any justification for the extent of the 16-level departure is wholly unexplained, except in the vaguest, general terms.[3]

The majority also acknowledges that the district court relied, in part, on the need for deterrence, as a ground for departure.[4]

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heartland.

____ U.S. at ____, 116 S. Ct. at 2045 (quoting *United States v. Rivera*, 994 F.2d 942, 949 (1st Cir. 1993)).

[3] The district court also relied, in part, on U.S.S.G. § 5K2.5, p.s. (property damage), to justify its upward departure. However, there is no explanation of how, or to what extent, the property damage here took the offense out of the heartland of U.S.S.G. § 2K1.4.

[4] The majority, *post hoc*, characterizes this ground as "the need for greater deterrence than usual." However, that is not what the district court said. The totality of its comments on this subject at sentencing were:

> I know that, but one of the other things here that the court is concerned about also is deterrence. There are still some grenades out

It attempts to justify this as a ground for departure because of "the special circumstances of more live grenades known still to be in related criminal hands in the locality."

First, I disagree that deterrence, or the need for greater deterrence, is a permissible ground for departure. Under U.S.S.G. § 5K2.0, a departure can be grounded only upon "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines (quoting 18 U.S.C. § 3553(b))." The "circumstances" referred in § 5K2.0 are those identified with the offender or the offense. The general need for deterrence is not a "circumstance" of either kind. If a departure could be based on such a general circumstance, then there is no reason why a departure would not be justified because of the increase of drugs in the community, or a sudden outbreak of drug-related offenses, or the proliferation of handguns in the community. As the three-judge panel noted, deterrence is not a permissible ground for departure because deterrence permeates the whole of the Guidelines.

The Commission created all of the Guidelines with the purpose of "crime control" in mind. *See* U.S.S.G. Ch. 1, Pt. A2-3. Deterrence of the use of explosives to damage

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there, and those are some of the things that primarily, the primary concern of the court is the physical injury inflicted here, there's just too much suffering endured by these people.

Accordingly, the court will depart to level 37, as it stated before.

The court also settled on this point in the Sentencing Guidelines mainly because of the physical injury involved; and secondarily, because of the property damage, and also because it is hoped that there be some deterrence that will be gained, that will be derived as a result of this case.

However, whether it be characterized as "deterrence," as the district court did, or as "the need for greater deterrence than usual," as the majority does, there is no reasoned justification for the extent of the departure based on this ground.

government buildings clearly lies within the "heartland" of 18 U.S.C. § 844(f), and its applicable Guideline, § 2K1.4.

Sablan I, 90 F.3d at 366.

Second, in concluding that its own identified "need for greater deterrence" was an acceptable ground for a departure, the majority does so in disregard of the analysis mandated by *Koon*, ___ U.S. at ___, 116 S. Ct. at 2045. Since "deterrence" is not an "encouraged" departure factor, it is, at best, "a factor [ ] unmentioned in the Guidelines." *Id.* Before a departure can be based on such a factor, however, "the court must, after considering the 'structure and theory of both relevant individual guidelines and the Guidelines taken as a whole,' decide whether it is sufficient to take the case out of the Guideline's heartland." *Id.* Here, neither the district court nor the majority has made this necessary analysis. Thus, it was an abuse of discretion for the district court to rely on this as a ground for departure.[5]

Quite apart from deterrence as a ground for departure, the district court's limited statements about "deterrence" do not explain, at all, the extent of the departure based on this ground. They certainly do not explain why a 16-level departure was justified, rather than a far lower or higher one. And, in its "review" of the reasonableness of the extent of the departure based on this ground, the majority does not even attempt to articulate a justification for the extent of the departure.

The district court identified three discrete grounds as the bases for its 16-level departure. At least one of these grounds, deterrence, is not a permissible ground for departure.[6] In these

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[5] As the Court has noted, "[a] district court by definition abuses its discretion when it makes an error of law." *Koon*, ___ U.S. at ____, 116 S. Ct. at 2047.

[6] It is impossible to tell whether "property damage" was a permissible ground for departure because the district court never articulated its reasons for believing why the property damage in this case took the case out of the heartland of U.S.S.G. § 2K1.4. *See* U.S.S.G. § 5K2.5.

circumstances, "a remand is required unless [the court of appeals] determines the district court would have imposed the same sentence absent reliance on the invalid factors." *Koon*, ___ U.S. at ___-___, 116 S. Ct. at 2053-54. *See also Williams v. United States*, 503 U.S. 193, 203, 112 S. Ct. 1112, 1120-21, 117 L.Ed. 2d 341 (1992).

> In this case, however, we cannot make that determination [required by *Koon* of whether the district court would have imposed the same sentence absent reliance on the invalid ground] given the district court's apparent reliance on several factors jointly as its basis for departure and its failure to provide any justification for the *extent* of its departure in this case.

United States v. Barajas-Nunez, 91 F.3d 826, 834 (6th Cir. 1996) (emphasis in original).

Finally, we note that our position on the continued vitality of *Lira-Barraza*, after *Koon*, is shared by the other circuits that have reached the issue.[7] In a case that did involve review of the extent of a departure, the Sixth Circuit held:

> Although *Koon* has changed the standard of review to an abuse of discretion standard, the rationale for requiring an explanation of reasons for departure and the extent thereof still remains.

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[7] The majority cites, in Part I of its opinion, the expected slew of cases confirming that *Koon* now mandates a unitary abuse of discretion standard of review in departure cases. To repeat, we have no quarrel with these cases. None of these cases, however, save one, including *United States v. Beasley*, 90 F.3d 400 (9th Cir.), *cert. denied*, ___ U.S. ____, 117 S. Ct. 533, 136 L.Ed.2d 418 (1996), involved or addressed the issue of how the extent of a departure should be reviewed. The one exception concluded that *Koon* did not affect that circuit's prior caselaw on the manner in which the extent of a departure is reviewed. *See United States v. Cali*, 87 F.3d 571, 580-81 (1st Cir. 1996).

Barajas-Nunez, 91 F.3d at 834. Similarly, the Seventh Circuit has held:

> Although *Koon* changed the standard of review with respect to the latter issue [of whether to depart at all], [___ U.S. at ___-___], 116 S. Ct. at 2046-48, and adopted a unitary abuse of discretion standard for the review of departure decisions, *id.* at 2047-48, we do not believe that it subverted our rationale for requiring a district court to explain its reasons for assigning a departure of a particular magnitude in a manner that is susceptible to rational review. *See, e.g., [United States v.] Ferra*, 900 F.2d at 1061-62 [(7th Cir. 1990)]. Indeed, we view this requirement as indispensable to furthering the "fundamental goal of the Sentencing Reform Act, which is to place federal sentencing on an objective, uniform, and rational (or at least articulable, *nonintuitive*) basis," *United States v. Pullen*, 89 F.3d 368, 371 (7th Cir. 1996) (emphasis added), a goal that is not jettisoned merely because a particular offense merits a departure from the Guidelines. Because this requirement does not deprive the district judge of the deference to which he is due, we do not believe it to be inconsistent with *Koon*, ___ U.S. at ___-___, 116 S. Ct. at 2047-48; *see, e.g., Sablan*, 90 F.3d at 365 (district court abuses discretion by not adequately linking extent of departure to structure of Guidelines).

United States v. Horton, 98 F.3d 313, 319 (7th Cir. 1996).

In short, the majority has not cited a single case to support its conclusion that *Koon* should be read to overrule *Lira-Barraza*, and similar cases, which require district courts to rationalize the extent of sentencing departures by analogy to the Guidelines or otherwise. The three-judge panel in *Sablan I* had it right. *Koon* did not overrule *Lira-Barraza* on review of the extent of departures.

> We do not, however, read *Koon* as freeing the district court from the general framework of the Guidelines in determining the extent of a departure. Indeed, *Koon* stated that the decision whether departure is justified by a factor not adequately considered by the Commission, or by the presence of a discouraged factor in an unusual or exceptional way, "are matters determined in large part by comparison with the facts of other Guideline cases." *Koon*, ___ U.S. at ___, 116 S. Ct. at 2047. Similarly, we conclude that the extent of an upward departure must still be governed by analogy to other Guidelines categories, as we held in [ ] *Lira-Barraza*, 941 F.2d at 748-51 [ ]. As we said there, "[t]he reasonableness of sentences determined without reference to identified standards would not be susceptible to rational review." *Id.* at 749. The district court retains discretion, but it is not free to divest itself entirely of the structure of the Guidelines. *Id.* at 748.

Sablan I, 90 F.3d at 365.

Because, like the three-judge panel, I would vacate the sentence and remand for resentencing in accordance with *Lira-Barraza*, I respectfully dissent.

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID TENORIO SABLAN,
Defendant-Appellant.

No. 94-10534

July 18, 1996

Before: FLETCHER, D.W. NELSON, and CANBY, Circuit Judges.

CANBY, Circuit Judge:

David Tenorio Sablan appeals the sentence imposed after his conviction for maliciously destroying property of the United States Post Office with an explosive in violation of 18 U.S.C. § 844(f). We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742. We vacate Sablan's sentence and remand to the district court for resentencing.

I.

David Tenorio Sablan, a native and resident of Guam, was 29 years old at the time of sentencing. Sablan has a history of psychological and emotional problems. He and his sixteen siblings were physically abused by their alcoholic father when they were growing up. Sablan was categorized as a "slow learner" in elementary school, and he cannot read or write. An evaluation conducted while he was in high school revealed that Sablan's I.Q. was in the borderline range for mental retardation, and another evaluation in December 1993 confirmed this diagnosis. His high school psychological records indicate that Sablan was developmentally delayed, suffered from low self-esteem, was "easily led" by others, and had an "inadequate personality."

Sablan started his long history of drug abuse in the eleventh grade, when he began smoking up to ten marijuana cigarettes each day. He started using "ice" (methamphetamine) in 1987, and was smoking a gram of ice every day by the time of the instant offense.

A year before the commission of the offense, Sablan met "Chas" Simpson at Simpson's business, where Sablan's brother was employed. Sablan started living with Simpson periodically after Simpson asked Sablan to help him take care of his house. Although Sablan cleaned Simpson's house, mowed his lawn, and drove Simpson to and from work, Simpson never paid Sablan for his services because of his own financial difficulties. Simpson gave Sablan free ice, however, and repeatedly tried to convince Sablan to commit robberies and burglaries for him.

On November 12, 1993, Simpson picked up Sablan to go for a ride. During the ride, Sablan smoked a gram of ice that Simpson gave him. Simpson then gave Sablan a grenade, with instructions to throw the grenade inside the police station in Dededo. The explosion was supposed to act as a diversion for the robbery of a Payless store. When the time came for Sablan to throw the grenade, Sablan changed his mind and decided to throw it in a parking lot area near the Post Office. At his presentencing interview, Sablan stated that he had decided against throwing it at the police station because he did not want to injure other persons.

When Sablan threw the grenade, it bounced off a car in the parking lot and rolled towards the Post Office, near three bystanders. The victims — Annie Mendiola, Mildred Isimang, and Alvin Toves — started to run away when they realized that it was a grenade. The grenade exploded, injuring them with shrapnel. Each suffered substantial physical injuries from the explosion. The blast also damaged the exterior wall of the Post Office, two police cars, and private vehicles of police officers who were on duty. After the blast Sablan hid near the police station, where police later apprehended him.

Several forensic psychiatric and psychological evaluations of Sablan were conducted between December 1993 and January

1994. Sablan was diagnosed as methamphetamine dependent, and he was referred for further psychiatric evaluation because of paranoid delusions. One doctor diagnosed Sablan with Psychotic Disorder NOS (Not Otherwise Specified) and opined that the psychosis may have been drug-induced, but did not rule out schizophrenia because Sablan continued to hear voices. Another physician diagnosed Sablan as a schizotypical personality, a diagnosis related to Psychotic Disorder NOS, and as having borderline intellectual function. That physician opined that Sablan could control his actions but "may have believed he needed to complete the extraordinary deed as the only method to be accepted by people he thought would be his friends," and that "the act was likely calculated to damage a police car, not to injure bystanders." Two physicians opined that Sablan was competent to stand trial.

Sablan pled guilty to territorial charges in the Guam Superior Court. The plea bargain Sablan negotiated in the Superior Court allowed him to serve ten years, to run concurrently with any federal sentence imposed. Sablan subsequently sought federal prosecution so that he could serve his sentence in a federal penitentiary with better resources for psychological treatment than were available in the on-island facility.

Sablan pled guilty to a federal charge of maliciously damaging a Post Office with an explosive, in violation of 18 U.S.C. § 844(f), and negotiated a plea agreement with the U.S. Attorney. Under the terms of the plea bargain, the government agreed to recommend a sentence of 10 years. Despite the government's recommendation, at sentencing the district court departed from an offense level of 21 to an offense level of 37, and imposed the statutory maximum of 20 years imprisonment (the plea bargain anticipated an upward departure to a level 30 or 31). Sablan appeals his sentence.

II.

Our analysis is informed by the recent decision of the Supreme Court in *Koon v. United States*, ___U.S.___, 116 S. Ct. 2035, 135 L.Ed.2d 392 (1996). We now review for abuse of discretion

a district court's decision that it has authority to depart from the Guidelines sentence. *Id.* at ___, 116 S. Ct. at 2046. The primary ground for departure asserted by the district court here was the extensive injuries to bystanders. The parties agree that this was a permissible ground.[1] *See* U.S.S.G. § 2K1.4, application note 1 (Nov. 1993).[2] Sablan challenges, however, the extent of the district court's upward departure under U.S.S.G. § 5K2.2.

Although the Supreme Court in *Koon* dealt with the grounds, and not the extent, of departure, the Supreme Court's opinion indicated that the sentencing court retains considerable discretion that should be recognized by the reviewing appellate court. *Koon*, at __-__, ___,116 S. Ct. at 2044-48, 2053. Indeed, we have previously held that the magnitude of a departure is subject to review for abuse of discretion. *United States v. Takai*, 941 F.2d 738, 742 (9th Cir. 1991). Ultimately, of course, the governing statute requires that the sentence not be "unreasonable." 18 U.S.C. § 3742(f)(1)(2).

We do not, however, read *Koon* as freeing the district court from the general framework of the Guidelines in determining the extent of a departure. Indeed, *Koon* stated that the decision whether departure is justified by a factor not adequately considered by the Commission, or by the presence of a discouraged factor in an unusual or exceptional way, "are matters determined in large part by comparison with the facts of other

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[1] The district court also mentioned property damage to the victims as a ground for departure, and Sablan does not contest that point. The property damage was primarily minor damage to automobiles, and does not vary the analysis relating to the extent of the upward departure.

Property damage to the Post Office is, of course, within the "heartland" of the offense of maliciously damaging a United States building with an explosive, 18 U.S.C. § 844(f), and would not constitute a permissible ground for upward departure. See *Koon*, ____ U.S. at __-__, 116 S. Ct. at 2044-45.

[2] Sablan was sentenced under the 1993 Guidelines.

Guidelines cases." *Koon*, ____ U.S. at ____, 116 S. Ct. at 2047. Similarly, we conclude that the extent of an upward departure must still be governed by analogy to other Guidelines categories, as we held in *United States v. Lira-Barraza*, 941 F.2d 745, 748-51 (9th Cir. 1991) (en banc). As we said there, "[t]he reasonableness of sentences determined without reference to identified standards would not be susceptible to rational review." *Id.* at 749. The district court retains discretion, but it is not free to divest itself entirely of the structure of the Guidelines. *Id.* at 748.

We conclude that, in this case, the district court abused its discretion by failing to establish the degree of the departure by analogy to other Guidelines provisions. Although the district court adequately explained its decision to depart upward because of the extensive injuries to the bystanders, it did not gauge the extent of its departure by reference to other Guidelines provisions. We have no way of knowing how the district court measured the degree of departure. *See id.* The district court's failure to analogize, and the unreasonableness of the resulting sixteen-level upward departure, require us to remand for resentencing. *See United States v. Montenegro-Rojo*, 908 F.2d 425, 431 (9th Cir. 1990) (remanding for resentencing because the district court failed to explain by analogy its departure on the basis of inadequacy of criminal history category); *cf. United States v. Todd*, 909 F.2d 395, 398-99 (9th Cir. 1990) (remanding because court failed to adequately explain degree of departure, although it had adequately explained its decision to depart).

The Government contends that the district court "effectively analogized" to U.S.S.G. § 2A2.2(b)(3), the Guideline for aggravated assault. The record does not reflect that the district court considered the standards of § 2A2.2(b)(3). Moreover, § 2A2.2(b)(3), a guideline for an offense that requires a specific intent to injure others, does not provide an appropriate analogy. There was no evidence that Sablan intended to injure any of the bystanders.

The offense level increases for permanent or serious bodily injuries under § 2B3.1 ("Robbery") and § 2B3.2 ("Extortion by Force or Threat of Injury or Serious Damage") provide more appropriate analogies for the upward departure in this case. Robbery and extortion by force, like property destruction by arson, are property-directed offenses that recklessly endanger others even when injury to others is not specifically intended. Under §§ 2B3.1 and 2B3.2, "[i]f any victim sustained bodily injury" the district court increases the offense level four points for "serious" bodily injury, six points for "permanent or life-threatening" bodily injury, or five points "if the degree of injury is between" those categories. It is true that an upward departure is permitted from the robbery guideline for multiple injured victims, *see* § 5K2.0, but here, too, the extent must be reasonably proportional to the single-victim level. The sixteen level upward departure by the district court does not reasonably relate to even multiple victim injury under a robbery analogy. On remand, the district court, if it chooses not to accept the recommended sentence in the plea bargain, should analogize to § 2B3.1 or § 2B3.2, or a comparable Guideline, if it decides to depart upwardly for bodily injuries pursuant to § 5K2.2.

Because the sentence greatly exceeded the appropriate Guideline analogy as discussed above, the sixteen-level upward departure was unreasonable and an abuse of discretion. *See Takai*, 941 F.2d at 742 (9th Cir. 1991) (reviewing extent of departure for an abuse of discretion); *see also Williams v. United States*, 503 U.S. 193, 203, 112 S. Ct. 1112, 1121, 117 L.Ed.2d 341 (1992) ("reasonableness determination looks to the amount and extent of the departure in light of the grounds for departing").

III.

Sablan also argues that the district court improperly considered deterrence as a basis for the upward departure. The court was concerned that other contraband hand grenades were at large, and wished to deter their use. Because the district court was clearly authorized to depart upward because of the injuries to the victims,

the additional ground of deterrence retains importance only as a factor that might affect the extent of the upward departure. We conclude that, to the extent that the district court may have increased the magnitude of the departure for reasons of deterrence, it abused its discretion.

The Commission created all of the Guidelines with the purpose of "crime control" in mind. *See* U.S.S.G. Ch. 1, Pt. A2-3. Deterrence of the use of explosives to damage government buildings clearly lies within the "heartland" of 18 U.S.C. § 844(f), and its applicable Guideline, § 2K1.4. Thus the use of an explosive device of itself would not justify departure. *See Koon*, ____U.S. at ____ - ____, 116 S. Ct. at 2044-45. Such use does not constitute "an aggravating . . . circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission." U.S.S.G. § 5K2.0 (internal quotations omitted). There is nothing in the record to indicate that other stolen grenades at large in the community create a need for deterrence "substantially in excess" of that ordinarily involved in § 2K1.4 offenses. *See* § 5K2.0.

The district court, then, abused its discretion in considering deterrence of the use of grenades as a factor justifying upward departure. To the extent that this factor may have increased the magnitude of the departure for injury to victims, it contributed to the unreasonableness of the sentence. *See Williams*, 503 U.S. at 200-01, 112 S. Ct. at 1119-20 (if sentence would have been different absent the district court's consideration of an improper factor, the sentence was imposed "as a result of" a misapplication of the Guidelines); *see also Koon*, ____ U.S. at ____ - ____, 116 S. Ct. at 2053-54 (when district court bases departure on valid and invalid factors, remand is required unless reviewing court determines that district court would have imposed same sentence absent the invalid factors).

IV.

The district court abused its discretion by not analogizing to appropriate Guidelines provisions in determining the extent of its upward departure. Largely as a consequence, the extent of its

upward departure was unreasonable. The district court also abused its discretion to the extent that it gave effect, for purposes of departure, to a factor of deterrence lying in the "heartland" of the offense of conviction. We consequently vacate Sablan's sentence and remand for resentencing.

SENTENCE VACATED; REMANDED.

[Filed Oct. 27, 1994]

UNITED STATES DISTRICT COURT
DISTRICT OF GUAM

UNITED STATES OF AMERICA,

v.

DAVID T. SABLAN
(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number: CR-94-00063

WILLIAM BISCHOFF, COURT APPOINTED,
Defendant's Attorney

THE DEFENDANT:

[X] pleaded guilty to count(s) I

[ ] was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section:	18:844(f)
Nature of Offense:	INJURING PERSONS BY MALICIOUSLY DAMAGING A POST OFFICE WITH AN EXPLOSIVE
Date Offense Concluded:	11/12/94
Count Number(s):	I

* * * *

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 240 MONTHS.

* * * *

STATEMENT OF REASONS

[X] The court adopts the factual findings and guideline application in the presentence report.

* * * *

The sentence departs from the guideline range

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[X] for the following reason(s): Pursuant to USSG § 5K2-2: The Court departed upward to offense level 37 based on the significant physical injury suffered by the victims.

IN THE DISTRICT COURT OF GUAM
TERRITORY OF GUAM

UNITED STATES OF AMERICA,	)
Plaintiff,	)
	)
vs.	) **CASE NO.**
	) **CR94-00063**
	)
DAVID TENORIO SABLAN,	)
Defendant.	)
	)

Friday, October 21, 1994
SENTENCING HEARING

TRANSCRIPT OF PROCEEDINGS

BEFORE: THE HONORABLE JOHN S. UNPINGCO
Chief District Judge

APPEARANCES:

For the Plaintiff: FREDERICK A. BLACK, Esq.
United States Attorney
BY: MARK KONDAS, Esq.
Asst. United States Attorney

For the Defendant: WILLIAM C. BISCHOFF, Esq.
Attorney At Law

* * * *

[5] * * * *

[THE COURT:] Now, the government moves the court to depart upward, from the base offense level of 21 to 32, based on the grounds — based on the fact that the defendant's conduct caused significant physical injury to Ann C. Mendiola, Mildred Isimang, and Alvin Toves, and these injuries are described in paragraphs 9, 10 and 11 of the [6] presentence report. And the government is urging that the motion for upward departure be granted.

So are you still urging that, government?

MR. KONDAS: Yes, Your Honor.

THE COURT: And for the record, the upward departure for physical injury in accordance with the Sentencing Guideline 5K2.2, the court has looked at *U.S. versus Singleton*, 917 Fed. 2d 411, and to see what kind of physical injury is considered significant. And there seems to be three characteristics, that is, severed pain, hospitalization, and subsequent incapacity or convalescence which may be prolonged. And the court accepts that. And in looking at the paragraphs in the probation officer's report that have been noted by the government, specifically paragraphs 9, 10 and 11, the court finds that those three criteria are met, and the court incorporates those three paragraphs in substantiating its upward departure.

And for the record, Ann C. Mendiola still has shrapnel inside her body, still experiences numbness and pain in her bones in the area where the shrapnel remains; and for three weeks after the blast incident she had difficulty sleeping, and she had nightmares about the blast.

Ms. Mildred Isimang was nine months pregnant; [7] she had four shrapnel wounds to her back: one on her buttocks, one on her left arm, one near her left ear, two shrapnel wounds in each leg. And she stated that delivering her baby was hell because it was very difficult since she couldn't lie on her back; the labor lasted seven hours which was the longest she had experienced.

And she still has shrapnel in her body and experiences numbness and pain where indicated.

Mr. Toves had to have surgery, because of shrapnel injuries to the stomach area. He had the through and through perforation of the ileum, with perforation of the right transverse column, laceration of the omentum, and right perineal histoma. And because of his injuries he had to use 300 hours of sick leave to recuperate.

The court will depart upward. It will not, however, depart to a level 32, but will depart to an offense level of 37. The court notes that according to the plea agreement, it is a Section B plea agreement, that the government just will recommend.

The court will announce its conclusions as to the appropriate offense level and criminal history category.

The base offense level is 24. Adjustment for acceptance of responsibility, minus 3. Total offense [8] level of 21; Criminal History category of 1. And the court has stated earlier it is departing upward to a level 37.

MR. BISCHOFF: If I may, Your Honor?

THE COURT: Yes, you may.

MR. BISCHOFF: We negotiated a plea agreement across the street, and it took a lot of time. Because the AG's office was very understanding and appreciative of David's mental and emotional difficulties, we agreed upon a fixed ten-year sentence to run concurrently to this.

We want David to spend his entire time in the federal penitentiary, not come back here and spend any time at Mangilao, because he may get bad influences on his arrival back on the island, and we figured in the federal pen he can get the kind of psychiatric help he needs, professional help that's available there.

THE COURT: Wouldn't that, wouldn't he still be able to do his ten years to run concurrent with whatever —

MR. BISCHOFF: Well, yes, Your Honor, it's just that we've all spent a lot of time on this case, and we all pretty much came to the considered opinion that ten years, given his mental and emotional difficulties, would be appropriate. I mean certainly he was liable to [9] many more years across the street with the five to 25-year discretionary for use of a dangerous or [sic] weapon, and we spent a lot of time on this, and we all pretty much came to the opinion that ten years is probably the appropriate time with his emotional and mental problems.

THE COURT: Mr. Kondas?

MR. KONDAS: Yes, Your Honor, I'd have to back up what Mr. Bischoff is saying. In fact, at the time of this incident happening, it was the local AG's office that was dealing with this case. I was contacted, I believe it was Mr. Stacy, and he informed me that the defendant — they wanted to get the defendant off-island, if we could enter a federal plea.

I agree, you know, with the court, this is outrageous conduct; however, in the defense for the defendant, he has cooperated with the FBI, given them some information. Everything Mr. Bischoff has told the court is correct, that they basically, they came to us to get him off the island, to get him into a federal penitentiary, and that's the only reason the federal government —

THE COURT: Well, let me ask you, Mr. Kondas, would that be in any way affected by departing upward more? Wouldn't it still be concurrent?

MR. KONDAS: It would still be concurrent, but [10] I don't know, with the spirit of the agreement that the defendant has with the local government. But yes, it will run concurrent by departing upward as the court intends right now, it would run concurrent.

THE COURT: There are several other factors besides the — besides the criteria noted, the severe pain and hospitalization. And one of them is that there are also other grenades still out there.

The second thing here is that in looking at this probation officer's report, that the defendant appears to have been under the influence of methamphetamine, crystal meth. And that defendant appears to have appreciated the seriousness of his act.

And the other thing here that's not mentioned, that has not been mentioned is that the victims actually saw the grenade rolling towards them, before exploding, and injuring them.

* * * *

[14] * * * *

MR. BISCHOFF: Well, your Honor, it was negotiated, and we spent a lot of time.

THE COURT: I know that, but one of the other things here that the court is concerned about also is deterrence. There are still some grenades out there, [15] and those are some of the things that primarily, the primary concern of the court is the physical injury inflicted here, there's just too much suffering endured by these people.

Accordingly, the court will depart to level 37, as it stated before.

* * * *

[22] * * * *

The justification for this, the upward departure from the prescribed Sentencing Guidelines to the 20-year maximum imprisonment sentence authorized by law is justifiable considering the extent of the physical injury, and the property damage suffered by the victims. Despite the victim's — or the defendant's — excuse me — defendant's characteristics, detonating a grenade is a very serious offense; the harm placed on [23] other people's lives and property will not be tolerated by the court.

Restitution is required by the court, and the fine is waived because of defendant's inability to pay one.

The court also settled on this point in the Sentencing Guidelines mainly because of the physical injury involved; and secondarily, because of the property damage, and also because it is hoped that there be some deterrence that will be gained, that will be derived as a result of this case.

* * * *

STATUTORY PROVISIONS

18 U.S.C. § 3742 ("Review of a sentence"):

(a) Appeal by a defendant. — A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence —

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) Appeal by the Government. — The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence —

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

* * * *

(e) Consideration. — Upon review of the record, the court of appeals shall determine whether the sentence —

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and is unreasonable, having regard for —

(A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and

(B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts.

(f) Decision and disposition. — If the court of appeals determines that the sentence —

(1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) is outside the applicable guideline range and is unreasonable or was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and —

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(3) is not described in paragraph (1) or (2), it shall affirm the sentence.

* * * *

Supreme Court, U.S.
FILED
DEC 9 1997
CLERK

No. 97-382

In the Supreme Court of the United States

OCTOBER TERM, 1997

DAVID T. SABLAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General
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QUESTION PRESENTED

Whether a district court is required to determine the extent of a departure from the Sentencing Guidelines by analogy to other Guidelines provisions.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-20a) is reported at 114 F.3d 913. The panel opinion of the court of appeals (Pet. App. 21a-28a) is reported at 90 F.3d 362.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1997. The petition for a writ of certiorari was filed on September 3, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Under an information filed in the United States District Court for the District of Guam, petitioner pleaded guilty to one count of maliciously damaging

a post office with an explosive, resulting in injury to persons, in violation of 18 U.S.C. 844(f) (1988).[1] He was sentenced to 20 years' imprisonment, to be followed by 60 months of supervised release. He was also ordered to pay restitution in the amount of $19,928.72. A panel of the court of appeals vacated the sentence and remanded for resentencing. Pet. App. 21a-28a. On rehearing en banc, the court of appeals affirmed the sentence imposed by the district court. *Id.* at 1a-20a.

1. On November 12, 1993, a friend gave petitioner a live hand grenade and told him to throw it inside the headquarters of the local police department in order to divert attention while the friend robbed a nearby store. Petitioner instead threw the grenade into the police parking lot adjacent to the local post office. The grenade bounced off a car and rolled toward several individuals, including a woman who was nine

---

[1] At the time of the offense, Section 844(f) read, in pertinent part:

> Whoever maliciously damages * * * by means of fire or an explosive, any building * * * in whole or in part owned, possessed, or used by * * * the United States * * * shall be imprisoned for not more than ten years, or fined not more than $10,000, or both; and if personal injury results * * * shall be imprisoned for not more than twenty years, or fined not more than $20,000, or both[.]

18 U.S.C. 844(f) (1988). Between the time of the offense and sentencing, Section 844(f) was amended to increase the maximum terms of imprisonment from ten years to twenty years for damage to government property, and from twenty years to forty years for injuries resulting to third parties. The maximum possible fines were increased as well. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320106(1), 108 Stat. 2111.

months pregnant. The blast injured five people, three of them severely. In addition, flying shrapnel damaged several cars and the exterior wall of the post office. Pet. App. 2a.

Petitioner pleaded guilty to territorial charges in Guam Superior Court. Pet. App. 3a. Under the territorial plea agreement, petitioner was to serve ten years' imprisonment, and that sentence was to run concurrently with any federal sentence that might be imposed. Petitioner thereafter pleaded guilty in federal district court to a one-count information that charged him with injuring persons by maliciously damaging a post office in violation of 18 U.S.C. 844(f) (1988). The government agreed to recommend a ten-year sentence. Pet. App. 3a.

Consistent with that agreement, the government moved for an 11-level upward departure based on the very serious injuries to three of the victims of the explosion. Pet. App. 3a, 32a. The district court agreed that an upward departure was warranted, but departed upward 16 levels, rather than 11, and imposed the statutory maximum of 20 years' imprisonment. *Id.* at 3a.

The court explained that the departure was based primarily on the injuries to the victims of the explosion:

> * * * Ann C. Mendiola still has shrapnel inside her body, still experiences numbness and pain in her bones in the area where the shrapnel remains; and for three weeks after the blast incident she had difficulty sleeping, and she had nightmares about the blast.
>
> Ms. Mildred Isimang was nine months pregnant; she had four shrapnel wounds to her back; one on

> her buttocks, one on her left arm, one near her left ear, two shrapnel wounds in each leg. And she stated that delivering her baby was hell because it was very difficult since she couldn't lie on her back; the labor lasted seven hours which was the longest she had experienced. And she still has shrapnel in her body and experiences numbness and pain where indicated.
>
> Mr. Toves had to have surgery, because of shrapnel injuries to the stomach area. He had the through and through perforation of the ileum, with perforation of the right transverse column, laceration of the omentum, and right perineal histoma. And because of his injuries he had to use 300 hours of sick leave to recuperate.

Pet. App. 32a-33a. The court found that "there's just too much suffering endured by these people." *Id.* at 35a. The court also relied on several other factors to support the extent of the departure, including that the victims "actually saw the grenade rolling towards them, before exploding, and injuring them," *ibid.*, that there was significant property damage, *id.* at 36a, and that there were unrecovered grenades in the locality, which created a greater need for deterrence than usual, *id.* at 34a-36a.

2. A panel of the court of appeals vacated the sentence and remanded for resentencing. Pet. App. 21a-28a. The panel held that "the district court abused its discretion by failing to establish the degree of the departure by analogy to other Guidelines provisions." *Id.* at 25a. The panel rejected the government's argument that the district court's 16-level departure could be justified by reference to the 6-level increase in the aggravated assault Guideline for permanent or life-

threatening bodily injury, adjusted to take into account the number of victims. *Ibid.* The panel concluded that an analogy to the aggravated assault Guideline was inappropriate because "[t]here was no evidence that [petitioner] intended to injure any of the bystanders." *Ibid.* The panel concluded that the 6-level increase for permanent or life-threatening injury in the Robbery and Extortion Guidelines provided an appropriate analogy. *Id.* at 26a. While the court acknowledged that a further increase would be permitted to take into account the number of victims, it concluded that a 16-level upward departure could not be justified on that theory. *Ibid.* The panel also held that the district court abused its discretion by relying on the need for deterrence as a departure ground. *Id.* at 26a-27a.

3. While neither the government nor petitioner sought rehearing, the court of appeals nonetheless reheard the case en banc and affirmed the district court's judgment. Pet. App. 1a-20a. The court held that each of the factors identified by the district court, including the additional need for deterrence, was a permissible ground for a departure. *Id.* at 9a-11a.

The court also held that the extent of the district court's departure was not unreasonable. Pet. App. 9a-12a. In reaching that conclusion, the court overruled its en banc decision in *United States* v. *Lira-Barraza*, 941 F.2d 745 (1991), which had held that a district court must determine the extent of a departure by analogy to other Guidelines provisions. Pet. App. 12a. The court stated that "in light of *Koon* [v. *United States*, 116 S. Ct. 2035 (1996)], we now reject such a mechanistic approach * * * and hold that where, as here, a district court sets out findings justifying the

magnitude of its decision to depart and extent of departure from the Guidelines, and that explanation cannot be said to be unreasonable, the sentence imposed must be affirmed." *Ibid.* The court made clear that its holding "should not be interpreted as prohibiting the district courts from considering the possible relevancy of analogous guidelines." *Id.* at 12a n.10. Instead, "[a]n analysis and explanation by analogy, per *Lira-Barraza*, may still be a useful way for the district court to determine and explain the extent of departure, but it is not essential." *Ibid.*

Five judges dissented. Pet. App. 13a. The dissenting judges concluded that *Koon* did not affect *Lira-Barraza's* requirement that the extent of departure must be analogized to other Guidelines categories. *Id.* at 14a-15a. The dissenters also concluded that "deterrence is not a permissible ground for departure." *Id.* at 16a.

ARGUMENT

Petitioner contends that review should be granted to resolve a conflict in the circuits on whether a district court is required to determine the extent of a departure by analogy to other Guidelines provisions (Pet. 6-19). Only two circuits, however, have addressed that issue since *Koon*; the conflict between those circuits is a narrow one and may not be of much practical importance; and the Sentencing Commission is best positioned to decide whether further guidance should be provided on the appropriate method for determining the extent of a departure. Review by this Court is therefore not warranted.

1. The court below held that, under *Koon*, district courts are not required to analogize to other Guidelines provisions in determining the extent of a depar-

ture. As long as a district court's explanation for the extent of departure is not "unreasonable," its sentence must be affirmed. Pet. App. 12a. That holding conflicts only with the Seventh Circuit's decision in *United States* v. *Horton*, 98 F.3d 313, 317-319 (1996). There, the Seventh Circuit reaffirmed its requirement that district courts must determine the extent of a departure by analogy to other Guidelines provisions, rejecting the contention that such a requirement is inconsistent with *Koon*. *Ibid.* The rest of the circuits, however, have not addressed the impact of *Koon* on the question whether a district court must gauge the extent of a departure by reference to other Guidelines provisions. Thus, even if the issue otherwise warranted this Court's review, it would not be ripe for review at this time. That issue should be allowed to percolate in the regional courts of appeals.

Petitioner contends (Pet. 7) that the issue is ripe for review, because the decision below also conflicts with the departure standards established in the Second, Third, and Tenth Circuits. Even before *Koon*, however, those circuits did not impose an absolute requirement that district courts analogize to other Guidelines provisions; they all recognized the possibility that departures could be shown to be "reasonable" in other ways. For example, in *United States* v. *Campbell*, 967 F.2d 20, 26-27 (1992), the Second Circuit affirmed a district court departure decision that had not relied on an analogy to other Guidelines provisions, but had relied instead on Congress's recent increase in a statutory maximum. The Second Circuit held that, once a district court has "ma[d]e clear on the record how [it] determined the magnitude of the departure[,] * * * the only question that remains is whether the departure is reasonable in light

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of the justification given." *Id.* at 27. In *United States* v. *Kikumura*, 918 F.2d 1084, 1113 (1990), the Third Circuit emphasized that "[t]here may be vehicles for making offense-related departures * * * other than * * * analogic reasoning," and it noted that district courts have a "superior vantage point" for developing such alternatives. And in *United States* v. *O'Dell*, 965 F.2d 937, 938-939 (1992), the Tenth Circuit upheld an upward departure despite the district court's failure "to explain the specific degree of departure by providing some method of analogy, extrapolation or reference to the sentencing guidelines." The court of appeals simply concluded that the extent of the departure was "clearly reasonable." *Id.* at 939.

Petitioner also errs in contending (Pet. 16) that the Second, Third, and Tenth Circuits have applied an analogy requirement in the wake of *Koon*. In the cases cited by petitioner, those circuits simply held that it is *permissible* to determine the extent of a departure by analogy to other Guidelines provisions. *United States* v. *Malpeso*, 115 F.3d 155, 170 (2d Cir. 1997); *United States* v. *Baird*, 109 F.3d 856, 872 (3d Cir.) cert. denied, 118 S. Ct. 243 (1997); *United States* v. *Collins*, 122 F.3d 1297, 1309 (10th Cir. 1997). Those cases did not address the question whether the extent of a departure *must* be determined through analogies, much less analyze whether *Koon* affects the correct resolution of that question. Because only the Seventh and Ninth Circuits have specifically addressed the impact of *Koon* on the question presented by petitioner, that question is not ripe for review.

2. Review is also unwarranted because the conflict between the Ninth and Seventh Circuits is relatively narrow and may not have much practical importance. Although the court below held that analogies are not

required, it made clear that district courts may still rely on analogies to explain the extent of a departure. Pet. App. 12a n.10. Moreover, since the decision below, the Ninth Circuit reversed a district court departure decision because the extent of the departure was not shown to be "reasonable" through analogies or otherwise. *United States* v. *Mathews*, 120 F.3d 185, 188-189 (1997). Analogies are therefore likely to continue to play a significant role in determining the extent of departures in the Ninth Circuit. At the same time, while petitioner refers to the Seventh Circuit's standard as an analogy *requirement*, he concedes (Pet. 15) that there will be cases in which there is no obvious analogy, requiring district courts to exercise judgment that is independent of the Guidelines. Thus, district courts in both the Seventh and Ninth Circuits are likely to rely on a combination of analogies and judgment to decide upon the extent of a departure. The conflict between the circuits may therefore turn out to be of little practical significance.

Petitioner contends (Pet. 17) that the conflict between the Seventh and Ninth Circuits will generate "obvious and unwarranted disparities." Petitioner relies only on the present case, however, to support that conclusion. He does not identify any body of experience that suggests that will be so. The First Circuit, for example, has applied a pure "reasonableness" standard for some time. *United States* v. *Diaz-Villafane*, 874 F.2d 43, cert. denied, 493 U.S. 862 (1989). Petitioner does not show that, with respect to the same departure factors, the extent of departure in the First Circuit differs radically from the extent of departure in the Seventh Circuit.

Even the present case does not assist petitioner's argument. While petitioner claims (Pet. 17) that he would have received a ten year sentence if there were an analogy requirement, his calculation (Pet. 4 n.7) is based only on one of the district court's departure grounds. Petitioner's calculation does not take into account that a further upward departure could be justified because the victims actually saw the grenade rolling towards them before exploding, there was additional property damage, and there were unrecovered grenades in the locality. Pet. App. 34a-36a. Moreover, petitioner's assertion depends on the assumption (Pet. 4 n.7) that the presence of three victims would support only an additional three-level departure, a position that even the panel opinion did not adopt. Pet. App. 26a. It is therefore far from clear that petitioner necessarily would have received a significantly different sentence if there were an analogy requirement.

There is also little basis for petitioner's apparent assumption that an analogy requirement is capable of eliminating disparity in the extent of departures. As already noted, there will be cases in which there is no useful analogy. Moreover, as petitioner recognizes (Pet. 15), there will also be cases in which there is more than one reasonable analogy, and in such cases the district court will be free to select the appropriate analogy. Indeed, petitioner cites a case (*ibid.*) in which an analogy approach left the district court with discretion to sentence a defendant to as little as 27 and as much as 262 months' imprisonment. Whatever its virtues, an analogy requirement is not a panacea for disparity.

3. Finally, this is an area in which it is appropriate to defer to the expertise of the Sentencing Commis-

sion. The Commission has the ability to determine whether the difference in approaches between the Seventh and Ninth Circuits leads to unacceptable disparities, and to devise appropriate solutions. See *Braxton* v. *United States*, 500 U.S. 344, 348 (1991). The Commission has already set standards to guide the extent of departures from criminal history categories. See Guidelines § 4A1.3 (Policy Statement). The Commission would have the authority to establish standards to guide offense level departures if its experience demonstrated that such guidance would be appropriate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DAVID T. SABLAN,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

1. The government concedes that the Ninth Circuit's *en banc* decision in this case squarely "conflicts" (Opp. 7) with the Seventh Circuit's decision in *United States v. Horton*, 98 F.3d 313, 317-19 (7th Cir. 1997), on the question whether district courts must gauge the extent of departures from the sentencing guidelines by reference to analogous guideline provisions. Given the frequency of departures from the guidelines, that conflict alone warrants this Court's review. But in any event, the circuit conflict is far deeper than the one-to-one split portrayed in the opposition.

The government errs in contending (Opp. 7-8) that the Second, Third and Tenth Circuits have never adopted the Seventh Circuit's position on the question presented here. As explained at length in the petition for certiorari (Pet. 9-14), those courts repeatedly have held that analogous guidelines constrain the permissible extent of departures. *See, e.g., United States v. Kim*, 896 F.2d 678, 684-85 (2d Cir. 1990); *United States v. Kikumura*, 918 F.2d 1084, 1110-19 (3d Cir. 1990); *United States v. Jackson*, 921 F.2d 985, 990-91 (10th Cir. 1990). The government's authority casts no doubt upon these holdings. In *United States v. Campbell*, 967 F.2d 20, 25 (2d Cir. 1992), the sole question presented was whether a departure was "procedurally flawed" because the district court had failed to "articulate on the record reasons for rejecting each intermediate level" between the defendant's actual offense level and the higher offense level to which the court had analogized.[1] In the portion of *Kikumura* cited by the government, the Third Circuit simply reserved the possibility that "there may be cases where the guidelines will not afford useful analogies." 918 F.2d at 1113. Where the guidelines *do* afford such analogies, however, the Third Circuit repeatedly has held that they determine the maximum permissible extent of any departure. *See United States v. Macleod*,

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[1] Although *Campbell* rejected *Kim's* suggestion that district courts must "give specific reasons for their rejection of *each* intermediate offense level," the Second Circuit later confirmed that *Campbell* did not "limi[t] in any way *Kim's* directive" regarding the use of analogies. *United States v. Alter*, 985 F.2d 105, 108 (2d Cir. 1993) (per curiam) (emphasis in original), *cert. denied*, 511 U.S. 1057 (1994).

80 F.3d 860, 867-69 (3d Cir. 1996); *United States v. Bierley*, 922 F.2d 1061, 1068-70 (3d Cir. 1990); *Kikumura*, 918 F.2d at 1114-19. Finally, *United States v. O'Dell*, 965 F.2d 937, 939 (10th Cir. 1992), on its face "*require[s]* the district court to explain the specific degree of departure by providing some method of analogy, extrapolation, or reference to the sentencing guidelines" (emphasis added).

The government also errs in suggesting (Opp. 8) that *Koon v. United States*, 116 S. Ct. 2035 (1996), casts doubt on the Second, Third, and Tenth Circuit decisions. The government glosses over the relevant post-*Koon* cases: *United States v. Malpeso*, 115 F.3d 155, 170 (2d Cir. 1997), in which the Second Circuit expressly reaffirmed *Kikumura* (and therefore *Kim*); *United States v. Baird*, 109 F.3d 856, 872 (3d Cir.), *cert. denied*, 118 S. Ct. 243 (1997), in which the Third Circuit expressly reaffirmed *Kikumura*; and *United States v. Collins*, 122 F.3d 1297, 1309 (10th Cir. 1997), in which the Tenth Circuit not only expressly reaffirmed *Jackson*, but also expressly disapproved the Ninth Circuit decision in this case. Moreover, the government's position simply confuses the standard of review question addressed in *Koon* with the underlying substantive question addressed in *Kim*, *Kikumura* and *Jackson* — the same kind of error that this Court recently and unanimously corrected, in another context, in *General Electric Company v. Joiner*, 66 U.S.L.W. 4036, 4037 (U.S. Dec. 15, 1997) (Slip op. at 4). Indeed, the principle that analogous guidelines constrain the extent of departures cannot possibly be inconsistent with the deferential standard of review adopted in *Koon*, for as the government itself explains (Opp. 10), that principle often allows a wide range of legally permissible outcomes.

Finally, the government acknowledges that *Horton* conflicts not only with the Ninth Circuit decision in this case, but also with First Circuit decisions that have "applied a pure 'reasonableness' standard for some time." Opp. 9, quoting *United States v. Diaz-Villafane*, 874 F.2d 43, 49 (1st Cir.), *cert. denied*, 493 U.S. 862 (1989). The government does not, and could not, contend that

Koon casts any doubt on the existence or persistence of the conflict between *Horton* and *Diaz-Villafane*.

2. The government errs in its second contention that the circuit conflict is either "narrow" or without "practical importance" (Opp. 8). Despite allowing the use of analogies (Opp. 9), the Ninth Circuit also allows the district courts, in determining the reasonableness of departure sentences, to ignore even concededly "analogous" guidelines. Pet. App. 12a-13a. And despite possibly allowing the exercise of judgment "independent of the Guidelines" where no analogies are available (Opp. 9), the Seventh Circuit (among others) prohibits the exercise of judgment that is not only "independent" of, but also inconsistent with, the judgments reflected in analogous guidelines. *See, e.g., Horton*, 98 F.3d at 317-19; *United States v. Ferra*, 900 F.2d 1057, 1061-64 (7th Cir. 1990).

The government further errs in asserting (Opp. 9-10) that these different legal standards are unlikely to produce significantly different sentences in individual cases. The cases themselves rebut that contention. For example, by adopting the Seventh Circuit rule in *Kikumura*, the Third Circuit reduced the maximum permissible sentence for the defendant in that case from 360 months to 262 months. *See* 918 F.2d at 1114-19.[2] Conversely, by abandoning the Seventh Circuit rule in this case, the Ninth Circuit increased the maximum permissible sentence for petitioner from (approximately) 120 months to (at least) 240 months. *Compare* Pet. App. 23a-26a (applying Seventh Circuit rule and vacating sentence) *with* Pet. App. 12a-13a (rejecting Seventh Circuit rule and affirming

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[2] Without consulting analogous guidelines, the Third Circuit, applying deferential review, would have had no basis to conclude that a 360-month sentence was unreasonable for a defendant who, after international training, had "manufactured three lethal home-made firebombs from scratch in preparation for a major terrorist bombing on American soil" (918 F.2d at 1089).

sentence).[3] Regardless of whether the Seventh Circuit rule "is capable of *eliminating* disparity" (Opp. 10), it significantly restricts the range of departure sentences that would otherwise be classified as reasonable, and therefore legally permissible.

3. Finally, citing *Braxton v. United States*, 500 U.S. 344 (1991), the government contends that this Court should not resolve the circuit conflict implicated in this case, but instead should "defer to the expertise of the Sentencing Commission" (Opp. 10-11). In *Braxton*, this Court announced that, because the Sentencing Reform Act specifically requires the Sentencing Commission to "review and revise . . . the guidelines" (28 U.S.C. § 994(o)), the Court generally would not grant *certiorari* to resolve circuit conflicts "with respect to the Sentencing Guidelines." 500 U.S. at 348. This case, however, involves a circuit conflict not with respect to the guidelines, but with respect to what constitutes an "unreasonable" departure sentence within the meaning of the Sentencing Reform Act, 18 U.S.C. § 3742(e)(3) and (f)(2). *Compare* Pet. App. 9a *with*, *e.g.*, *Horton*, 98 F.3d at 317 *and Ferra*, 900 F.2d at 1061-62. Even after *Braxton*, this Court

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[3] Although the government questions our calculation of petitioner's maximum permissible sentence under the Seventh Circuit rule (Opp. 10), it does not dispute that analogous guidelines impose only a six-level enhancement to account for the extent of a victim's "permanent or life-threatening" injuries. Pet. 4 n.7; Pet. App. 25a-26a. Moreover, although the government suggests that an additional three-level enhancement is insufficient to account for the fact that this case involves three different victims (Opp. 10), it does not dispute that the appropriate grouping rules (U.S.S.G. § 3D1.4) would produce that result if petitioner's crime had been treated as three separate offenses. Every court of appeals to adopt the Seventh Circuit rule has required application of the grouping rules by analogy. *See*, *e.g.*, *Jackson*, 921 F.2d at 991; *Kikumura*, 918 F.2d at 1112; *Ferra*, 900 F.2d at 1062-63; *Kim*, 896 F.2d at 684. Finally, although the government notes that the district court briefly noted additional considerations (Opp. 10), it does not dispute that the district court's principal consideration was the extent of physical injury to the victims (Pet. App. 30a, 36a).

repeatedly has granted *certiorari* to resolve circuit conflicts involving the proper construction of the Sentencing Reform Act. *See, e.g., United States v. LaBonte*, 117 S. Ct. 1673, 1676-77 (1997); *United States v. Watts*, 117 S. Ct. 633, 634-35 (1997); *Koon v. United States*, 116 S. Ct. 2035, 2043-45 (1996); *Melendez v. United States*, 116 S. Ct. 2057, 2060 (1996); *United States v. R.L.C.*, 503 U.S. 291, 296-99 (1992); *Williams v. United States*, 503 U.S. 193, 198-99 (1992). The Court should continue that settled practice in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

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